

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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In the Matter of)	
)	
Review of the Section 251 Unbundling)	CC Docket No. 01-338
Obligations of Incumbent Local Exchange)	
Carriers)	
)	
Implementation of the Local Competition)	CC Docket No. 96-98
Provisions in the Telecommunications Act)	
of 1996)	
)	
Deployment of Wireline Services Offering)	CC Docket No. 98-147
Advanced Telecommunications Capability)	
)	

REPLY COMMENTS OF SBC COMMUNICATIONS INC.

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INTRODUCTION AND SUMMARY

The Commission today is at a crossroads. The telecommunications industry is plagued by declining capital investment and frequent bankruptcies. Nowhere have the excesses of the '90s taken a greater toll. Yet the underlying vitality and importance of this sector cannot be denied. Demand for telecommunications products – especially for broadband and other new technologies – could (and should) propel both the industry and the economy generally. The critical question is what regulatory structure will best promote and serve this demand.

Most everyone, of course, pays lip service to the importance of facilities-based competition as a key ingredient in the revival of the telecommunications industry. But it has been so much easier (and faster) to opt for Potemkin Village competition built on regulatory arbitrage. That is the whole reason for the UNE-P, and it is what is driving CLEC requests for unbundling and access at TELRIC prices even to new ILEC investment. Instead of a transitional mechanism to facilities-based competition, unbundling has become an end-game for the major platform-based carriers. And state regulators, reluctant to rebalance local business and

residential rates, as is their charge under 47 U.S.C. § 254, are increasingly opting instead to lower UNE prices even further in order to spur the *appearance* of competition. As Chairman Powell has noted, rather than rebalance rates to encourage genuine competition, states have made wholesale rates “confiscator[ily] cheap.”¹

The Commission must accordingly choose between two fundamentally different models of competition – between, on the one hand, a model that will encourage true facilities-based competition and the deployment of new broadband technologies that the nation so badly needs; and, on the other, a purely unbundled universe in which price arbitrage counts for competition, and the business plans of a few financially troubled carriers dictate the competitive options ultimately available to consumers.

The choice ought to be clear, both as a legal and a policy matter. The Supreme Court and the D.C. Circuit have each made it painfully clear that the “more unbundling the better” approach of the Commission’s last two orders is unlawful. As explained in detail below, the Commission simply *cannot* order the unbundling of elements that are, in the words of the Supreme Court, “sensibly duplicable.”² Unbundling is to be reserved for “bottleneck facilities,” facilities which, as the D.C. Circuit explained, have “characteristics that would make genuinely competitive provision of an element’s function wasteful.”³ Where CLECs can supply an element on their own, or obtain it from third parties, it should not be forcibly unbundled.

The policy arguments against excessive unbundling and the UNE-P are equally compelling. Pervasive unbundling may provide a temporary respite to a few carriers – like WorldCom and AT&T – that have built their business plans around the UNE-P and that view the

¹ Fred Dawson & Kim Sunderland, *Interview: FCC Chairman Michael Powell*, Phone+ (Apr. 2002), at <http://www.phoneplusmag.com/articles/241INTERVIEW.html>.

² *Verizon Communications Inc. v. FCC*, 122 S. Ct. 1646, 1672 n.27 (2002).

³ *United States Telecom Ass’n v. FCC*, 290 F.3d 415, 427 (D.C. Cir. 2002) (“USTA”).

platform as a means to avoid access charges and to cherry-pick high-volume, high-margin residential customers. But the CLEC attempts to extort ever-lower TELRIC prices from state commissions is not a sustainable strategy for the industry as a whole. Complete unbundling and the UNE-P at TELRIC rates dramatically devalue the investments made by facilities-based CLECs that have to compete with the arbitrageurs riding on the ILECs' networks, and discourage them from making any further investment. At the same time, ILEC margins are being slashed, and their ability and incentive to invest in new technologies, to retain employees who operate the network, and to continue to provide universal service are being destroyed, as they lose hundreds of thousands of their most profitable lines every month – not to real competition, but to the “synthetic competition” created by pervasive unbundling rules. SBC has been losing more than 200,000 lines per month to the UNE-P – preliminary numbers show 270,000 lines lost to UNE-P in June alone – and the number is increasing rapidly. A recent JP Morgan report indicates that, for each line lost to the UNE-P, the BOCs lose 60 percent of the revenues on that line, while retaining 95 percent of the costs.⁴ New capital investment is impossible in such an atmosphere, but without new capital investment, the industry as a whole will never recover. And the future will remain bleak for quality of service, innovation, and jobs.

Rhetoric aside, the UNE-P is a regulatory invention that may have been created with the best of intentions, but has had devastating, if unintended, consequences. It gives the appearance of competition, but the so-called UNE-P competitors rely entirely on a cherry-picking strategy to serve only the most profitable customers. The UNE-P is, at the end of the day, simply a wealth transfer from incumbent facilities-based providers to companies that deploy and maintain no facilities or networks, that bring no competitive benefits to typical residential consumers, and

⁴ See J.P. Morgan Securities Inc., *Industry Update – No Growth Expected for Bells in 2003* (July 12, 2002) (“JP Morgan July 2002 Industry Update”).

that have no viable, long-term business strategy in any event. By retaining the UNE-P and allowing the states to push UNE rates ever lower, the Commission can sustain a short-term illusion of competitive entry, but only by bringing new investment to a halt, to the long-term detriment of all consumers, while ultimately wreaking havoc in the entire industry.

Some CLECs argue that more unbundling will in fact lead to more facilities-based investment, by CLECs and ILECs alike. They accordingly urge upon the Commission a totally unbundled universe, with unrestricted access to the UNE-P and a proposed new data-P. Maximum unbundling, they suggest, will give the CLECs maximum flexibility in formulating their competitive plans and, hence, maximize their opportunities for productive investment. They also contend that the competitive pressure exerted by UNE-enabled CLECs will in turn spur new investment by ILECs in both narrowband and broadband facilities.

These arguments cannot be squared with the facts or the law. To be sure, in an effort to appear responsive to the Commission's request for hard evidence in this proceeding, a few CLECs purport to provide evidence that the UNE-P promotes facilities-based competition. AT&T, for example, claims that it has deployed more switches in New York than California, which has lower UNE-P usage. And Z-Tel – a “UNE-P forever” CLEC that has admitted that it does not intend to deploy its own switches – claims that “empirical” evidence shows that even the limited unbundled switching restriction adopted in the *UNE Remand Order*⁵ has reduced levels of mass-market competition and CLEC switch deployment.⁶

⁵ Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696 (1999) (“*UNE Remand Order*”), petitions for review granted and remanded, *United States Telecom Ass’n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002).

⁶ See Z-Tel Public Policy Paper No. 3, *An Empirical Exploration of the Unbundled Local Switching Restriction* (Mar. 2002) (Attach. 14 to Z-Tel Comments); Z-Tel Public Policy Paper No. 4, *Does Unbundling Really Discourage Facilities-Based Entry? An Econometric Examination of the Unbundled Switching Restriction* (Feb. 2002) (Attach. 15 to Z-Tel Comments).

But this so-called “evidence” is woefully deficient. As we show in detail below and in an attachment to these reply comments, AT&T’s showing – limited, as it is, to AT&T’s own investment in two states, and which fails even to take into account *when* that investment took place relative to AT&T’s use of the UNE-P – is so patently flawed and incomplete as to be completely meaningless. It is data manipulation of the worst sort. Z-Tel’s studies of the unbundled switching restriction are equally meaningless because, as a practical matter, that restriction has not been in effect in the vast majority of the country. Because of the qualifications to the unbundled switching restriction, SBC, Verizon, and Qwest all have continued to provide unbundled local switching throughout their territory, even to customers to whom the restriction applies.

When one looks at *all* the relevant data points – all states for which information is available, both before and after the UNE-P – there is only one conclusion to draw from the evidence: there is a *negative* correlation between the UNE-P and facilities-based investment. As the attached analysis shows, a comprehensive examination of the market evidence demonstrates that the more unbundling is available – and in particular the more CLECs are attracted to low-priced UNE-P – the less CLECs invest in facilities of their own. Moreover, the suggestion that CLECs are using the UNE-P simply to build a customer base before transitioning to facilities-based competition is simply a myth. No more than a handful of UNE-P customers – and virtually no residential customers – have been transitioned to CLEC facilities. As their current business plans make clear, moreover, neither AT&T nor WorldCom, the biggest proponents of this theory, has any intention of transitioning customers from the UNE-P to their own facilities.

Independent research confirms the dramatic social costs of too much unbundling. A recent report by the Gartner Group notes that, “[b]y bringing data services into the UNE fray,” the FCC has caused “a near-complete halt to advanced infrastructure investment from the

incumbents and newcomers.”⁷ Calling UNEs “the death knell for broadband,” Gartner notes that “[e]ven cable companies will have no incentive to go beyond their existing infrastructure without robust competition from the telecom industry.”⁸ Likewise, a report by Cambridge Strategic Management Group estimates that complete deregulation in broadband (with no unbundling obligation) would lead to **six times the investment** in new facilities than would occur in an unbundled environment: **a difference of more than \$39 billion over the next 10 years.**⁹ And the former chief of staff of the FCC under Chairman Reed Hundt, under whose regime the UNE-P was invented, recently co-authored a report concluding that “the more successful” WorldCom’s “The Neighborhood” – a bundled offering that relies entirely on the UNE-P for local service – “the more it will reduce the attractiveness of the telephony opportunity for cable.”¹⁰

All of this simply confirms what the nation’s leading economists, analysts, and experts have been stating all along: unbundling comes at a very high cost and therefore should be mandated only where competitors have no alternative but to use the ILEC network. As the late Professor Areeda has explained: “Competition requires that inputs economically capable of being supplied competitively – that is, by numerous independent sources – be supplied in that manner. Forced sharing of such inputs acts as a disincentive to producing them competitively in the first place.”¹¹ When the government forces a company “to provide [a] facility and regulat[es]

⁷ Gartner Dataquest, *UNEs: Stifling U.S. Broadband Growth and Ineffective in Promoting Local Competition* at 5, 8 (Feb. 2002) (“Gartner Report”).

⁸ *Id.* at 8-9.

⁹ Cambridge Strategic Management Group, *Assessing the Impact of Regulation on Deployment of Fiber to the Home* at 11-13 (Apr. 2002) (“CSMG Report”).

¹⁰ Blair Levin & Michael J. Balhoff, Equity Research Industry Update, Legg Mason, *WorldCom/MCI Bundled Phone Offer Challenges Rivals, Regulators* at 2 (Apr. 23, 2002).

¹¹ Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 787c, at 183 (2001 Supp.) (“Areeda & Hovenkamp”).

the price to competitive levels, then the [prospective entrant's] incentive to build an alternative facility is destroyed altogether.”¹² A coalition of broadband manufacturers agrees that “[b]asic economic principles dictate that the imposition of Section 251 unbundling obligations on new, last-mile facilities for the benefit of other carriers discourages ILEC investment in broadband deployment because it reduces the value of the ILECs’ investment.”¹³

Even AT&T has noted, in a different context (where it could be on the wrong end of unbundling obligations), that it has been “universally accepted” as a “fundamental economic truth” that mandatory access obligations come at the high cost of stifling facilities investment.¹⁴ AT&T’s completely inconsistent claims in this proceeding stand in stark contrast to its recognition of this “universally accepted” “fundamental economic truth” in other contexts.

It is for precisely this reason (the disincentive effect of too much unbundling) that Congress imposed a limit on unbundling in 47 U.S.C. § 251(d)(2). And it is for precisely this reason that both the United States Supreme Court and the D.C. Circuit have categorically rejected as inconsistent with the 1996 Act the “more is better” approach to unbundling that many CLECs here espouse.

In *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), the Supreme Court vacated the FCC’s initial unbundling rules because their provision for “blanket access” to network elements was inconsistent with the “necessary” and “impair” standards of section 251(d)(2). Seven Justices agreed that such a “blanket access” approach was contrary to Congress’s plan.

¹² 3A Areeda & Hovenkamp ¶ 771b, at 175 (1996).

¹³ High Tech Broadband Coalition Comments at 28. *See also id.* at 29 (“Requiring ILECs to share the rewards of broadband deployment (*i.e.*, to unbundle network elements used in the provision of broadband service) with carriers that incur none of the risks of investing in new, last-mile broadband facilities reduces the ILECs’ expected return on investments and thus serves as a disincentive for ILEC investment in new or upgraded facilities.”).

¹⁴ Comments of AT&T Corp. at 42, 68-69, GN Docket No. 00-185 (FCC filed Dec. 1, 2000) (“AT&T Open Access Comments”).

The Court thus remanded with instructions for the FCC to establish a genuine “limiting standard, rationally related to the goals of the Act.”¹⁵ In doing so, the Court also made clear that the FCC must consider the availability of competitive alternatives (including self-provisioning) to the use of unbundled network elements, and that the FCC could not simply assume that any difference in cost or reduction in quality, standing alone, was adequate to justify a finding of impairment.¹⁶

More recently, in *Verizon v. FCC*, while addressing the separate issue of the appropriate pricing methodology for whatever elements must be unbundled, the Court explained in even stronger terms that the statute limits the unbundling requirement to bottleneck elements that cannot easily be duplicated. After reiterating its conclusion in *Iowa Utilities Board* that the Commission’s prior rules failed to create a “limiting standard” for the unbundling of network elements,¹⁷ the Court repeatedly stated that the elements that are properly unbundled (and therefore made available at TELRIC rates) are “bottleneck elements,” “bottleneck facilities,” “facilities that are very expensive to duplicate (say, loop elements),” and “some costly-to-duplicate elements [that are] necessary to provide a desired telecommunications service.”¹⁸ In fact, the Court rejected arguments that TELRIC discourages facilities-based competition based on the assumption that low rates for facilities that are not sensibly duplicable would better enable competitors “to build their own versions of less expensive facilities that are sensibly duplicable.”¹⁹ Significantly, the Court specifically identified “digital switches [and] signal-multiplexing technology” as examples of facilities that are “sensibly duplicable.”²⁰

¹⁵ *Iowa Utils. Bd.*, 525 U.S. at 388.

¹⁶ *Id.* at 389-90.

¹⁷ *Verizon*, 122 S. Ct. at 1664.

¹⁸ *Id.* at 1672 & n.27.

¹⁹ *Id.* at 1668 n.20.

²⁰ *Id.* at 1672 n.27.

Taking its lead from the Supreme Court’s analysis, the D.C. Circuit then made resoundingly clear that the Commission is not at liberty under the 1996 Act to embrace the maximum unbundling agenda of some CLECs. The court rejected in no uncertain terms the notion that “more unbundling is better” because “Congress did not authorize so open-ended a judgment.”²¹ “[U]niversal rules encompassing as many elements as possible,” the court explained, stimulate “completely synthetic competition” that fails to fulfill the Act’s purpose.²² Indeed, such rules are at war with the goals of the Act, for they impose on society significant costs. “Each unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities.”²³

Both the Supreme Court’s and the D.C. Circuit’s opinions therefore mandate the balanced view of the Act that SBC described in its opening comments – and reject outright the opposing claims of the “more unbundling is better” and “UNE-P forever” CLECs. Both decisions compel the Commission to establish a meaningful test of “impairment.” That means, first of all, where CLECs have employed, or readily could employ, facilities of their own, or purchase them from third parties, they must do so, rather than piggyback on the incumbents’ network. Unbundling is reserved, as the Supreme Court stated again and again, for “bottleneck facilities” that are “very expensive to duplicate” and yet are still “necessary to provide a desired telecommunications service.” The whole point of an unbundling obligation is to give competitors access to these bottleneck facilities so that they can “build their own versions of less expensive facilities that are sensibly duplicable.”

²¹ *USTA*, 290 F.3d at 425.

²² *Id.* at 424.

²³ *Id.* at 427.

In applying this standard, moreover, the Commission cannot “rely on cost disparities that are universal as between new entrants and incumbents in *any* industry.”²⁴ The D.C. Circuit acknowledged that the ILECs may have scale economies over the CLECs and a more ubiquitous network. But “average unit costs are necessarily higher at the outset for any new entrant into virtually any business.”²⁵ “A cost disparity approach that links ‘impairment’ to universal characteristics, rather than ones linked (in some degree) to natural monopoly, can hardly be said to strike” the balance that the Act requires.²⁶ Instead, the Commission must focus on “cost differentials based on characteristics that would make genuinely competitive provision of an element’s function wasteful.”²⁷ Again, in the words of the Supreme Court, unbundling only applies to “bottleneck facilities,” not to those “sensibly duplicable” elements that new entrants can and should be expected to provide on their own.

This means, among other things, that the Commission must disallow UNEs, and hence the UNE-P, wherever alternatives exist. If competitive facilities already have been deployed, then *ipso facto* they can be deployed. That does not mean that the mere presence of a single competitive facility in a particular market necessarily precludes a finding of impairment in that market. But it is hard to see how the Commission could find impairment in any market in the presence of two or three competitive alternatives, much less in a market, such as the broadband market, where the incumbent has significantly less than half the market share of the market leader. In fact, that is precisely what the D.C. Circuit held when it faulted the Commission for failing to give any rational explanation for its decision to unbundle transport despite the

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

existence of three or more facilities-based competitors in 47 of the top 50 areas, and for ordering line sharing despite cable's large lead over DSL.

It also means that, while the Commission may not require unbundling in markets with competitive alternatives, it cannot limit its analysis merely to an identification of markets in which competitive alternatives already have been deployed. The absence of competitive facilities in a particular market may or may not be the result of impairment. To the extent competitive facilities have not been deployed in a particular market, therefore, the Commission must attempt to determine why, and it must differentiate between true impairment and factors that have nothing to do with impairment. It may be simply that competitors have turned to other markets first, in an effort to target the "lowest hanging fruit." Or it may be that competitors have been kept from the market by unattractive retail rates. As a recent analyst report explained:

Most states have frozen residential basic exchange rates at levels at or below cost. Gartner Dataquest estimates that in the United States, the average cost of providing basic residential service (including an element of free local calling) is approximately \$20 per month. But in many states, the basic residential rate has been frozen at or below \$15 per month because of heavy lobbying by consumer groups to preserve affordable and "universal" service. It's not difficult to see that competitors are not attracted to markets where they take a loss on each unit sold²⁸

The D.C. Circuit made eminently clear that unattractive retail rates do not represent "impairment" and that an absence of facilities-based competition in such markets is not a problem to be addressed with UNEs. Rather, in the absence of rational retail rates, "any competition will be wholly artificial."²⁹

That is not to say that true impairment cannot exist in markets with below-cost retail rates. For example, the Commission could reasonably conclude that CLECs are impaired in their

²⁸ *Gartner Report* at 7.

²⁹ *USTA*, 290 F.3d at 422.

ability to provide basic POTS service without access to a copper loop, notwithstanding that retail prices for POTS service may be below cost. The Commission thus reasonably could require incumbent LECs to unbundle copper loops. The Commission must be careful, however, to keep its focus on *impairment*, not on the forced generation of *artificial* competition where retail rates do not permit real competition.

Recognizing that the D.C. Circuit's opinion requires the Commission to reject their "the more UNEs, the better" approach, ALTS and CompTel have recently urged the Commission to ignore what it claims are the "flawed reasoning" and "dubious new factors" set out in that decision.³⁰ Of course, the Commission knows it cannot simply turn its back on the D.C. Circuit's legal mandate. As already noted, moreover, the D.C. Circuit decision is fully consistent with the Supreme Court's own recent pronouncements on unbundling.

In short, all factors – the 1996 Act, the market evidence, sound competition policy, binding legal precedent, and common sense – point in the same direction: The Commission must dramatically reduce its unbundling requirements so that real competition – not "synthetic competition" – will flourish.

To that end, and as SBC explained in its comments, four principles should guide the Commission's decision whether to force unbundling of a particular element. *First*, new investment – whether to provide service to new locations (so-called "green field" investment) or to provide competitive broadband services to new and existing locations – should not be subject to unbundling. Such investment can be undertaken on an equal footing by new entrants and incumbents alike, and the Commission must avoid rules that would discourage such investment. *Second*, UNEs should not be available in markets that are already competitive. The

³⁰ See *Ex Parte* Letter from John Windhausen, Jr., President, ALTS, and H. Russell Frisby, Jr., President, CompTel, to Michael K. Powell, Chairman, FCC, CC Docket Nos. 96-98 & 98-147 (FCC filed June 5, 2002).

Commission's goal in this proceeding should be to allow unbundling only to the extent it is needed for competition, and UNEs are not needed in markets that already are functioning without them. Indeed, the injection of UNEs into such markets would only distort the competition that already exists in those markets. *Third*, the Commission must look to facilities that CLECs have actually deployed in actual markets and draw reasonable inferences about the feasibility of deployment in other markets where CLECs have not yet deployed alternative facilities, being careful to distinguish between real impairment and factors that have nothing to do with impairment. *Finally*, the Commission must preempt state efforts to add unbundling obligations beyond the scope of those imposed here. A decision *not* to unbundle is just as critical to the purposes of the Act as a decision *to* unbundle. To ensure that the balance struck in this proceeding is not undermined by the states, both decisions must be honored by state commissions.³¹

Not surprisingly, some CLECs purport to attack these principles. As shown below, however, their arguments cannot withstand scrutiny.

First, CLECs that seek access to new ILEC investment never explain how they are impaired without access at TELRIC rates to facilities that were never part of the incumbents' legacy networks, or under what theory Congress would have seen fit to give them such access. Their primary claim seems to be that it is impossible to segregate new and legacy investment in any meaningful way. But SBC has proposed a carve-out for new investment that does precisely that. It would apply only in "green field" scenarios, where there are no existing facilities, and to packet technologies and networks, which, as SBC showed in its comments, are distinct from the legacy, circuit-switched network. CLECs also claim that incumbents are more able to deploy

³¹ Even where unbundling is not mandated, SBC is willing to negotiate with competitors for access to network elements on commercially reasonable terms and conditions. Market-based prices, determined in freely negotiated transactions, will not discourage investment by either CLECs or ILECs. But state-mandated TELRIC rates discourage both.

new technology because they have an embedded base of customers and readier access to capital. But, even if true, those considerations are not the stuff of impairment; rather, they are examples of “cost disparities that are universal as between new entrants and incumbents in *any* industry.”³²

Likewise, commenters that seek to use UNEs in markets that already are competitive, such as broadband, long distance, and wireless, fail to show any legal basis upon which the Commission could make UNEs available in those markets. Nor could they, because UNEs could not possibly be needed in markets that already are functioning without them. The real agenda of parties that seek UNEs in such markets is quite simple: higher profits. But the Supreme Court already has made clear that this is not a permissible basis for unbundling, and for good reason. The central premise of the 1996 Act is that markets are more effective than regulators in establishing costs, setting prices, and allocating resources. To inject UNEs into markets that are functioning without them would betray a fundamental lack of faith in this premise. It would be the ultimate regulatory conceit, and it would risk lasting damage to the affected markets. As the D.C. Circuit explained, “nothing in the Act appears a license to the Commission to inflict on the economy the sort of costs” that come with unbundling, where there is “no reason to think doing so would bring on a significant enhancement of competition.”³³

No more convincing are commenters advocating “the more UNEs, the better” approach. These commenters have no answer to why UNEs and the UNE-P should be made available where competitors are already using or should be able to use alternatives to UNEs. Where competitors are already using alternatives or can “sensibly” do so, a shared access regime will retard competition and decimate the investments that carriers have already made in competitive facilities. That is why, as both the D.C. Circuit and the Supreme Court have made unequivocally

³² *USTA*, 290 F.3d at 427.

³³ *Id.* at 429.

clear, the Act prohibits unbundling except in those limited circumstances where the facility in question is not “sensibly duplicable.”

Finally, those who claim that states must be permitted to add to the UNE list do so for one reason only: they want more UNEs and the UNE-P, regardless of the law. But, as the Supreme Court has made clear, the Commission is required by law to establish an upper *limit* on the provision of UNEs, not merely a floor. The 1996 Act expressly assigns to the FCC the task of “determining what network elements should be made available for purposes of” satisfying the requirement that an ILEC provide to CLECs nondiscriminatory access to network elements on an unbundled basis.³⁴ The FCC’s determination of which network elements go on (and which elements stay off) the list of elements to be unbundled is a question of federal policy to which states must adhere. As the Supreme Court has explained, “the question . . . is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has.”³⁵ When the federal agency charged with implementing section 251(d)(2) strikes the appropriate balance between the benefits of unbundling “bottleneck facilities” and the costs of unbundling facilities that would otherwise be “sensibly duplicable,” the states are powerless to strike a different balance.

Application of these principles will lead to a national unbundling regime that is faithful to both the letter and spirit of the 1996 Act. CLECs will be given unbundled access to those elements of the incumbents’ networks that are not sensibly duplicable, but they will be required to furnish on their own, or pay real market rates, for access to those elements that are not bottleneck facilities. Under such a regime, as discussed below, CLECs would continue to

³⁴ See 47 U.S.C. § 251(d)(2).

³⁵ *Iowa Utils. Bd.*, 525 U.S. at 378 n.6.

receive unbundled access to copper loops and operations support systems (OSS). In addition, the Commission conceivably could require unbundled access to DS-1 loops and transport in certain areas, although SBC is not convinced that any unbundling of these facilities is required. ILECs may not be required, however, to provide unbundled access to other network elements, including, most importantly, broadband facilities, circuit switching, and all other high capacity loops and transport. We discuss these individual elements below and, in more detail, in Part II of this Reply.

Broadband. To accept the “more UNEs, the better” arguments of AT&T and other CLECs would harm all aspects of competition, but perhaps nowhere is that danger more evident than broadband. The Commission’s rules already exclude (except in very limited circumstances) packet-based technologies – including, of course, packet switching – from unbundling. There is no basis for the Commission to reverse course.

As AT&T observed not long ago, “[c]ompetition and marketplace forces will quite simply yield procompetitive and pro-consumer outcomes far more effectively than could any regulatory requirements” in the broadband marketplace.³⁶ AT&T has noted that a “hands-off” policy in broadband is “consistent with the universally accepted economic and public policy framework for determining when regulators should interfere with market mechanisms and dictate the terms and conditions upon which one firm provides access to its facilities and services to competitors.”³⁷ Because “[c]ompetition in the nascent broadband Internet services business is thriving,” and because there is no “serious risk of abuse of a bottleneck monopoly,” “there can be no serious argument” that regulation is appropriate.³⁸

³⁶ AT&T Open Access Comments at 2.

³⁷ *Id.* at 42.

³⁸ *Id.*

In this proceeding, however, AT&T refuses to accept the “universally accepted economic and public policy framework.” Instead, AT&T now makes the counterfactual and illogical claim that “unbundling obligations have no adverse effect on ILEC broadband investment and promote broadband investment and competition in voice and data service.”³⁹

Nothing could be further from reality. Commissioner Hurley of the Illinois Commerce Commission (“ICC”) recently recognized how well-intentioned regulators can undermine investment and hurt consumers by requiring unbundling of broadband infrastructure. In commenting on the ICC’s handling of SBC’s Project Pronto, he wrote:

With the internet/tech/telecom market being as it has been for the last year, it is likely to be years, if ever, before Pronto is rolled out to the extent that it would have been but for this Commission’s desire to micromanage the emerging broadband market. In the end, consumers in Illinois are unlikely to receive *any* substantive benefit from the ICC’s involvement relative to this issue. On the other hand, there are many thousands of people who have been unable to get DSL from SBC or its competitors for the last year, and many thousands more who may have to wait years before they have the opportunity. We need to keep in mind that our decisions must benefit the consumers of Illinois, and not a regulator’s fantasy of how the world should be.⁴⁰

The ICC’s experience with Project Pronto is a real-world example of the “fundamental economic truth” that broadband investment must be protected from regulatory burdens, or it simply will not happen in the first place. This is a cold reality that the Commission cannot ignore. No one will build when the risks of failure are privatized and the benefits socialized, particularly when the fruits of their labor are available at idealized cost-based prices that ignore the risks of new construction in an uncertain industry. As the D.C. Circuit’s opinion explains,

³⁹ AT&T Comments at 12.

⁴⁰ Order, *Illinois Bell Telephone Company, Proposed Implementation of High Frequency Portion of Loop (HFPL)/Line Sharing Service*, No. 00-0393 (ICC Apr. 26, 2002) (“*Illinois HFPL Order*”) (concurring opinion of Commissioner Edward C. Hurley).

“[i]f parties who have not shared the risks are able to come in as equal partners on the successes, and avoid payment for the losers, the incentive to invest plainly declines.”⁴¹

That is why the broadband equipment manufacturers that supply the inputs for *all* types of broadband service, no matter what the medium, urge the Commission not to require the unbundling of these facilities.⁴² These companies have everything to gain by new investment and everything to lose when it does not materialize. As the D.C. Circuit has recognized, these firms’ only interest is the development of competitive markets. They “sell goods and services that are *inputs* to the production and use of [advanced] services,” and they “stand to gain [from] an expanding market.”⁴³ They accordingly “have the incentive to make a completely unbiased judgment on the matter.”⁴⁴

Circuit Switching. The evidence is overwhelming that circuit switching is sensibly duplicable and not a bottleneck facility that the ILECs should be forced to unbundle. The CLECs themselves admit that there is an abundance of switching facilities. ALTS reports there are more than 1,240 competitive voice switches.⁴⁵ Carriers of all sizes are deploying these switches in all markets.

Any suggestion that carriers are not actually using their switches to serve customers also is impossible to square with the facts. SBC estimates that CLECs now serve 18.6 percent of the switched access lines in its regions – and the bulk of these lines (about 60-70 percent) are served by CLECs’ own switches. The numbers are similar across the combined regions of SBC, BellSouth, Qwest, and Verizon, with CLECs accounting for anywhere between 16 and 20

⁴¹ *USTA*, 290 F.3d at 424.

⁴² See *infra* pp. 44-45, 56, 98 (summarizing comments).

⁴³ *United States v. Western Elec. Co.*, 993 F.2d 1572, 1582 (D.C. Cir. 1993).

⁴⁴ *Id.*

⁴⁵ ALTS Annual Report, *The State of Local Competition 2002*, at 8 (Apr. 2002) (“2002 Local Competition Report”), at <http://www.alts.org/Filings/2002AnnualReport.ppt>. See also AT&T Comments at 50.

percent of switched access lines with approximately two-thirds of those lines being served by CLEC switches. As of year-end 2001, CLECs were using their own circuit switches to serve customers in 47 percent of BOC wire centers, which account for nearly 86 percent of all BOC access lines. In the 100 largest MSAs, CLECs use their own switches to serve customers in 86 percent of the wire centers in those MSAs, which contain 96 percent of BOC access lines.

This evidence supports one conclusion, and one conclusion only: CLECs are not impaired without access to unbundled switching.

Loops and Transport. The *Fact Report*⁴⁶ shows there are at least 184,000 miles of fiber – and ALTS claims the number is closer to 350,000 miles. At the DS-3 level and above, the amount of competitive fiber is staggering. AT&T itself has conceded that it self-provides DS-3 transport a full **[proprietary begin] XX percent [proprietary end]** of the time. And, for the “tail” portion, AT&T provides a whopping **[proprietary begin] XX percent [proprietary end]** of its own DS-3 facilities.⁴⁷ Indeed, ILECs provide a mere **[proprietary begin] XX percent [proprietary end]** of AT&T’s DS-3 tails,⁴⁸ demonstrating that **[proprietary begin] XX percent [proprietary end]** of AT&T’s DS-3 facilities are obtained from non-ILEC sources. Even at lower capacities, competitive fiber abounds. Again, consider AT&T’s own data. **[proprietary begin] XX percent [proprietary end]** of its DS-1 tails are self-provided or provided by third parties; in the case of DS-0 facilities, its tails are obtained from non-ILEC sources **[proprietary begin] XX percent [proprietary end]** of the time.

That CLECs have deployed so many alternative transport facilities is evidence that they can do so, not only in the markets in which they already have deployed such facilities, but in

⁴⁶ *UNE Fact Report 2002*, at I-3, III-6, CC Docket No. 01-338, *et al.* (Apr. 2002) (“*Fact Report*”) (Attach. A to SBC Comments).

⁴⁷ AT&T Confidential Comments at 150 n.109.

⁴⁸ *Id.* at 150 n.110.

other markets that they have not yet reached for reasons that have nothing to do with impairment. Unless the characteristics of these markets are such that competitive transport facilities simply are not viable or “sensible,” there is no impairment in these markets irrespective of whether competitive facilities have, as of yet, been deployed in them.

SBC believes that CLECs are not impaired anywhere without access to dedicated transport. However, it has offered as an alternative a more granular proposal under which DS-1 dedicated transport would remain available in the vast majority of wire centers, but not in those wire centers in which alternative facilities have been deployed or where demand is such that there is no reason to believe that they could not be deployed. Under that proposal, the Commission would remove from the list of UNEs all high-capacity interoffice transmission facilities, including DS-3 and above, and dark fiber. DS-1 transport facilities would be unavailable in wire centers: (1) with two or more fiber-based collocators, (2) with at least 15,000 business lines, or (3) that generate \$150,000 or more in monthly special access revenues.

The Commission should adopt a similar test for loops. The economics of high-capacity loops and transport are the same: when traffic volumes reach a level warranting high capacity, competitive provision is both possible and desirable. CLECs are now using their own last-mile facilities to serve the vast majority of their large business customers. For example, CLECs self-supply the loops for all but 1.5 million of the 13-20 million business lines that they currently serve using their own switches. Based on these totals, CLEC self-supplied loops account for between 20 and 28 percent of all business lines nationwide. And CLECs’ share of the business market is undoubtedly much higher, as CLECs serve more than 156 million voice-grade circuits over their own facilities.

The prevalence of competitive high-capacity loop and transport facilities also refutes CLEC claims that they are impaired without the ability to substitute UNEs for special access

circuits. Where both elements of special access (dedicated loops and dedicated transport) can be competitively provided, they can and must be so provided. Moreover, based on public sources, including FCC data, and using a methodology that AT&T has endorsed in the past, CLECs now account for between 28 and 39 percent of all special access revenues. Thus, even if the Commission were to require unbundling of loop/transport combinations, it should keep in place the existing requirement that such combinations be used to provide local service, and thus prevent its unbundling mandate from undermining the mature competition that exists for special access.

Other UNEs. CLECs have likewise failed to support their grab-bag requests for additional UNEs, including signaling, call-related databases, operator services, and directory assistance. Competitive alternatives for these elements abound. Indeed, that some CLECs would even request these UNEs – without a shred of data to back-up their claims – shows their general failure to acknowledge what is actually happening in the marketplace.

But, while commenters may have elected to ignore the actual marketplace evidence in submitting their comments, the Commission cannot ignore these data in promulgating its unbundling rules. The Commission cannot order unbundling in the face of evidence showing that CLECs can successfully compete without using any of these facilities. The D.C. Circuit's opinion has made that abundantly clear.

PART ONE: THE FRAMEWORK FOR UNBUNDLING

Three years ago, the United States Supreme Court held that 47 U.S.C. § 251(d)(2) establishes “clear limits” on ILEC unbundling obligations. These limits exist because unbundling imposes its own social costs and thus should be required only where and when the facility in question is not sensibly duplicable.

At their most fundamental level, the comments of AT&T, WorldCom, and other CLECs that favor maximum unbundling ignore these limits. They continue to advance the theory that, when it comes to unbundling, more is better, and so the Commission should unbundle virtually everything, while letting the states find even more to unbundle. They invite the Commission to play a shell game: to pay lip service to the impairment standard while scrupulously ignoring the real meaning of that standard.

Now that the D.C. Circuit has rejected the unbundling framework established in the *UNE Remand Order*, these commenters undoubtedly will invent another shell game that pays lip service to the D.C. Circuit opinion, while making an end-run around its intent and true meaning. The Commission must resist this invitation. It has been six years since the Commission’s local competition rules were first adopted, and the industry desperately needs rules that not only comport with the letter and spirit of the Act, but also will survive judicial review. This means that the Commission must establish unbundling rules that are faithful to mainstream economic principles, are informed by the facts, and, most importantly, are consistent with the Act and binding precedent.

I. THE CLECS’ PROPOSAL FOR MAXIMUM UNBUNDLING IGNORES THE SIGNIFICANT COSTS OF EXCESSIVE UNBUNDLING.

It is, or at least should be, axiomatic that unbundling requirements inflict certain costs on society. Indeed, Congress enacted the impairment standard of section 251(d)(2), as

Commissioner Abernathy points out, precisely to ensure “that the FCC would consider whether the costs associated with forced sharing of incumbent LECs’ facilities were warranted.”⁴⁹ Yet the CLECs that ask the Commission to order unbundling of every conceivable network element wholly fail to acknowledge the costs of mandated sharing. Their comments are littered with statements reflecting their inability to appreciate (or their willingness to ignore) the costs of too much unbundling. Sprint, for example, argues that, “[i]f non-ILEC alternatives are actually available to requesting carriers in a particular area to such an extent that requesting carriers would not be impaired by the absence of ILEC facilities, then it should be *no particular burden* to require ILECs to continue making those unbundled elements available.”⁵⁰ WorldCom likewise asserts that “even if the retail market for high-speed Internet access or for broadband business services were competitive, *that would not affect the incumbent LECs’ unbundling obligations.*”⁵¹ AT&T similarly claims that “if the Commission were to order unbundling in some instance where some CLECs would not be ‘impaired’ . . . such action would do *no harm to competition*, for it would not diminish any CLEC’s incentive to invest in its own facilities.”⁵² That is because, according to AT&T, “CLECs will always prefer to provide service through their own facilities, wherever it is possible to do so, regardless of whether UNEs are also available.”⁵³

To accept the faulty premise of these arguments is to deny rational behavior. If CLECs have unbundled access to all aspects of the ILEC network, it depresses their incentives to invest and experiment with new technologies. Other CLECs who have pursued facilities-based alternatives will see their investment devalued by having to compete with TELRIC-priced UNEs.

⁴⁹ Kathleen Q. Abernathy, Commissioner, FCC, Remarks at the USTA Annual Convention (Oct. 7, 2001).

⁵⁰ Sprint Comments at 15 (emphasis added).

⁵¹ WorldCom Comments at 60 (emphasis added).

⁵² AT&T Comments at 46 (emphasis added).

⁵³ *Id.*

At the same time, with the prospect of privatized risk and socialized benefits, the ILECs' own incentive to invest in new technologies will be eviscerated.

The Commission's unwillingness to recognize this economic commonplace was one of the key reasons the D.C. Circuit reversed the *UNE Remand Order*.⁵⁴ The court observed that Congress did not authorize the Commission to adopt the view that "in this area more unbundling is better."⁵⁵ Instead, the court held that the Commission must consider the costs of unbundling, including the disincentives for both ILEC and CLEC investment. The court observed that "prices that *seem* to equate to cost have" the effect of "reduc[ing] or eliminat[ing] the incentive for an ILEC to invest in innovation (because it will have to share the rewards with CLECs), and also for a CLEC to innovate (because it can get the element cheaper as a UNE)."⁵⁶ "If parties who have not shared the risks are able to come in as equal partners on the successes, and avoid payment for the losers, the incentive to invest plainly declines."⁵⁷

A. The Greater the Unbundling Obligations, the Greater the Disincentive for CLEC Investment.

The reason why unbundling diminishes CLEC incentives to deploy their own facilities (and devalues the investments of CLECs who have pursued a facilities-based strategy) should be so obvious as not to require restatement. As the leading treatise on antitrust and competition explains: "Competition requires that inputs economically capable of being supplied competitively – that is, by numerous independent sources – be supplied in that manner. Forced sharing of such inputs acts as a disincentive to producing them competitively in the first place."⁵⁸ And, when the government forces a company "to provide [a] facility and regulat[es] the price to

⁵⁴ *USTA*, 290 F.3d at 424.

⁵⁵ *Id.* at 425.

⁵⁶ *Id.* at 424.

⁵⁷ *Id.*

⁵⁸ Areeda & Hovenkamp ¶ 787c, at 183 (Supp. 2001).

competitive levels, then the [prospective entrant's] incentive to build an alternative facility is destroyed altogether.”⁵⁹ At the same time, any CLEC that has sunk capital in new facilities will see those facilities dramatically devalued by the TELRIC-based prices of competing UNEs.

Incredibly, AT&T and other CLECs contend that complete unbundling – and the UNE-P made possible by such complete unbundling – brings only competitive benefits and that “[t]he availability of [the] UNE-P has no offsetting disadvantages.”⁶⁰ Instead of acknowledging the “fundamental economic truth” – as AT&T once did – that unbundling deters investment, AT&T and the other CLECs now claim that unbounded availability of UNEs, and of the UNE-P in particular, “affirmatively fosters investment by CLECs and ILECs alike.”⁶¹ The UNE-P is a no-lose proposition, according to their claims.

AT&T and the other CLECs make five arguments for their counter-intuitive assertion that the availability of risk-free, low-cost facilities for lease *enhances* their incentive to invest in their own facilities. *First*, they claim that the UNE-P enables them to acquire the core customer base necessary to justify an investment in facilities. *Second*, they claim that the facts prove a correlation between broader unbundling and more investment. *Third*, they claim that experience in opening long distance to competition proves that unbundling leads to facilities-based competition. *Fourth*, they contend that the availability of UNEs would not deter a CLEC from deploying its own facilities if it could because CLECs prefer to use their own facilities. *Fifth*, and in frank recognition of how bogus the first four arguments are, the CLECs claim that excessive investment in facilities has been the cause of the current market debacle and therefore

⁵⁹ 3A Areeda & Hovenkamp ¶ 771b, at 175 (1996).

⁶⁰ WorldCom Comments at 82; *see* AT&T Comments at ii-iv.

⁶¹ AT&T Comments at 11; *see* WorldCom Comments at 5-6.

it should not concern the Commission even if its unbundling rules do discourage CLEC investment.

None of these arguments has merit.

1. The CLECs that advocate the UNE-P as necessary to assemble a large residential base of customers tout the UNE-P as the royal road to mass-market, facilities-based competition.⁶² But, as an initial matter, despite what they tell the Commission here, the CLECs themselves do not view UNE-P as a true “mass market” initiative. Rather, by their own admission, they “target[] [their] efforts to the lowest priced urban zones and in some cases the middle-priced suburban zones, but rarely in the high-priced rural zones.”⁶³ They also target only the high-end customers in those geographic segments. WorldCom’s “The Neighborhood” plan, for example – a combined long distance/local voice service – is available only to customers who are willing to commit to \$50 to \$60 a month, far in excess of what the average consumer spends.

The Commission should be under no illusion, then, that the UNE-P is a vehicle for mass-market competition. It is, rather, a vehicle for “cherry-picking.” In fact, it *engenders* cherry-picking, far more so than resale. Because local rates are not generally cost-based, a wholesale regime under which finished services are available at “cost” (*i.e.*, TELRIC) necessarily drives competitors to high-margin customers and away from customers whose rates are low relative to costs. In contrast, resale discounts are a fixed percentage, regardless of the retail rate. Hence, carriers availing themselves of resale do not have significantly greater incentives to target one customer over another. The Commission must ask itself which regime makes more sense given the failure of states to establish cost-based local rates.

⁶² See, e.g., AT&T Comments at 223, 227, 230-31; WorldCom Comments at 26; Talk America Comments at 6; Navigator Comments at 6.

⁶³ Wayne Huyard, Chief Operating Officer, MCI, *Using UNE-P to Develop a Strong and Profitable Local Presence*, Presentation at the Goldman-Sachs Telecom Issues Conference (May 7, 2002); see also *id.* (“We’re profitable everywhere we sell because we limit and target where we sell based on cost.”).

To be sure, the states are endeavoring to create incentives for mass-market competition via UNEs by setting TELRIC rates so low that a margin is created even for below-cost customers. As Chairman Powell has noted, rather than rebalance rates to encourage genuine competition, states have made wholesale rates “confiscator[ily] cheap.”⁶⁴ But that does not eliminate cherry-picking; it only enhances the arbitrage opportunity for high-margin customers, who remain the focus of “competitive” efforts. Nor does it create competition. Of course, AT&T and WorldCom and the other UNE-P carriers can win customers if they are given a steep enough discount on the UNE-P. But competition is supposed to reward efficiency and innovation, not those who are the beneficiaries of wholesale rates that are “confiscator[ily] cheap.” That kind of artificial competition is not sustainable, and the short-sightedness of this approach could drive the industry to ruin.

In any event, even where these carriers use the UNE-P to assemble a large base of customers (generally high-margin customers), they seem uninterested in investing in their own facilities. For example, despite the fact that AT&T and WorldCom have a residential customer base of more than a million in New York alone, they still do not appear to have converted any of those residential customers to their own switches. Indeed, the number of customers of any kind – business or residential – that have been migrated from UNE-P to CLEC facilities is miniscule.

As seen in this light, WorldCom’s “The Neighborhood” is simply the latest example of this UNE-P forever strategy. “The Neighborhood” is a “plan [that] involves renting parts of the Bells’ local network at the lowest wholesale rates possible.”⁶⁵ The entire point of this new plan is “that it requires no deployment of capital and permits cherry-picking of the customer base.”⁶⁶

⁶⁴ Dawson & Sunderland, *supra* note 1.

⁶⁵ Shawn Young, *WorldCom Sets an Assault on Bells*, Wall St. J., Apr. 15, 2002, at B5.

⁶⁶ Anna-Maria Kovacs, Commerce Capital Markets, *Telecom Regulation Update: UNEP and 271* (Apr. 19, 2002).

This strategy, in other words, is wholly dependent on UNEs. WorldCom does not even pretend that its strategy is to transition customers to its own facilities; UNEs themselves are the end game and the centerpiece of the business model.

WorldCom is by no means alone in its UNE-P forever strategy. AT&T has taken the same approach as WorldCom, particularly in New York and other states where UNE-P rates have been pushed to the ground. As states have made wholesale rates “confiscator[ily] cheap” to generate the appearance of competition,⁶⁷ AT&T and a select group of other CLECs are following suit with a “no-build” strategy that focuses solely on regulatory arbitrage.

Even if some CLECs do want to assemble a large base of customers before using their own switches to serve residential customers, the Act expressly gives them a vehicle through which to do so: resale of ILEC services pursuant to section 251(c)(4). To be sure, the UNE-P may offer higher profit margins when used to cherry-pick select customers, but that should hardly be a compelling consideration if the ILEC facilities really are being used on a short-term, transitional basis. As discussed below, a resale model was tremendously successful in sparking competition in the long distance market, and there is no reason to doubt it would have the same effect in local markets. The Supreme Court, in fact, recently made clear that unbundling was *not* intended to be another form of resale, but at a lower price. Rather, unbundled access falls “[b]etween th[e] extremes” of resale and interconnection.⁶⁸

2. AT&T claims to prove that UNEs do not deter investment by noting that facilities-based competition is strong in New York, which has a long history of the UNE-P. Indeed, to hear AT&T tell it, New York has an abundance of competitive facilities *because* of the availability of the UNE-P. To reach this conclusion, AT&T notes that it has more facilities-

⁶⁷ Dawson & Sunderland, *supra* note 1.

⁶⁸ *Verizon*, 122 S. Ct. at 1662.

based investment in New York (where the UNE-P is widespread) than in California (where it is not). And this proves, according to AT&T, that more UNE-P leads to more facilities-based investment.⁶⁹

In fact, it proves nothing but how shamefully AT&T is willing to manipulate the data. As an initial matter, to make the claim that the UNE-P *promotes* facilities-based competition, the facilities themselves must come *after* the UNE-P. In fact, however, AT&T and other CLECs deployed most of their circuit switches in New York *before* the rise of the UNE-P.⁷⁰ Effect preceding cause should be the stuff of science fiction, not Commission proceedings.

Another critical flaw with AT&T's "methodology" is the manner in which AT&T selected its data points. Analyzing a single CLEC's operation in only two states is, as the attached report on UNE-P and Investment attests, "brazen data dredging."⁷¹ As the attached report demonstrates, a full analysis of all the states with significant volumes of UNE-P shows, in fact, that there is a significant negative correlation between facilities-based competition and UNE-P usage.

The flaws with AT&T's analysis do not stop there. Even taking its selective comparison – between New York and California – the results are exactly the opposite of what AT&T claims. Since the end of 1999 – when the UNE-P took off in New York – AT&T, WorldCom, and all CLECs collectively deployed more of their new switches in California than New York.⁷² In fact, the number of facilities-based residential lines is proportionately *higher* in California than the number in New York. Thus, even taking the selective snapshot upon which AT&T relies, the data do not support the striking claim that the UNE-P promotes facilities-based competition. On

⁶⁹ AT&T Comments at 49-50; AT&T's Willig Decl. ¶¶ 106-108 (Attach. F to AT&T Comments).

⁷⁰ UNE-P and Investment at 5 (attached hereto as Attach. A).

⁷¹ *Id.* at 4.

⁷² *Id.* at 5.

the contrary, the data confirm what economists have long predicted: UNEs deter facilities-based entry.⁷³

Z-Tel, the only other CLEC even to purport to present “empirical” evidence, claims that the unbundled switching restriction has reduced levels of mass-market competition and CLEC switch deployment.⁷⁴ But Z-Tel’s studies of the unbundled switching restriction are completely meaningless because, as a practical matter, that restriction has not been in effect in the vast majority of the country. SBC, Verizon, and Qwest all have continued to provide unbundled local switching throughout their territory, and did so throughout the period in Z-Tel’s analysis, even to customers to whom the restriction applies. Z-Tel’s analyses suffer from other flaws as well. For example, while the unbundled switching restriction applies only to large business customers, Z-Tel attempts to correlate the effects of that restriction with the levels of competition for residential and small business customers to whom the restriction does not apply. Moreover, while Z-Tel claims that the switching restriction has reduced levels of switch deployment, it overlooks the fact that the supposedly restricted markets already had very high levels of switch deployment before the restriction took effect, which is precisely why the Commission imposed the restriction in the first place. It should come as no surprise that CLECs deployed proportionately fewer competitive switches in markets that already had a relatively high level of competitive switch saturation than in markets with a relatively low level of saturation.

The actual market evidence unequivocally confirms the fundamental economic principle that the UNE-P deters facilities-based investment by CLECs. Looking at data from *all* states with significant volumes of UNE-P, it is clear that facilities-based competition within a state

⁷³ This is true, moreover, if one compares New York to other states. Although UNE-P penetration is far greater in New York than in any other state, CLEC investment is proportionately higher in most other states. Of the 48 contiguous states, New York ranks 39th in the number of CLEC switches deployed per BOC access line. *Id.* at 6-7.

⁷⁴ See Z-Tel Comments Attachs. 14 & 15.

decreases as UNE-P penetration in that state increases.⁷⁵ Or, to put it another way, there is a strong negative correlation between facilities-based competition and UNE-P usage.⁷⁶

Thus, while the UNE-P may offer more entry in the short-term,⁷⁷ this “synthetic competition” has the harmful side effect of preventing real competition from ever emerging.

3. Several commenters rely on the development of facilities-based competition in the long distance market to support their claims that UNEs promote facilities-based competition.⁷⁸ AT&T, for example, argues that, “[l]ike CLECs today, MCI and Sprint entered the long distance market initially through the use of the incumbent’s facilities, and migrated as quickly as was feasible to providing service through their own facilities once they had acquired sufficient customers to justify such investments.”⁷⁹ AT&T would therefore have the Commission believe that long distance experienced its competitive growth because of an expansive unbundling regime similar to the AT&T advocates here.

In fact, the regime under which long distance competition developed was not remotely like the unbundling regime endorsed by the CLECs. Long distance competition developed under a *resale* regime, not a UNE regime. In fact, it was a resale regime in which AT&T’s competitors were permitted to purchase services for resale – *without any wholesale discount* – from AT&T’s retail tariffs. In essence, AT&T’s competitors were permitted to avail themselves of the volume discounts AT&T chose to make available to its largest business customers. This is a far cry from an unbundling regime in which wholesale inputs are prescribed by regulators under a TELRIC methodology. It is a regime in which AT&T never had to offer a wholesale rate it was unwilling

⁷⁵ UNE-P and Investment at 1-2 & Fig. 1.

⁷⁶ *Id.* at 1.

⁷⁷ AT&T Comments at 88; WorldCom Comments at 27.

⁷⁸ AT&T Comments at 48-49; Sprint Comments at 16; CompTel Comments at 12.

⁷⁹ AT&T Comments at 14.

to provide to a retail customer, and, as such, it was a regime: (1) that gave AT&T adequate incentives to serve the wholesale market, (2) in which entrants were not able to obtain wholesale inputs at below-cost rates, and (3) that, accordingly, maintained the incentives of new entrants to build their own facilities. As such, it was also relatively self-effectuating; it did not require ongoing micro-management by regulators, and it did not spawn endless regulatory haggling. The UNE-P regime offers none of these virtues.

There are, then, lessons to be learned from the long distance experience, but they are not the lessons touted by AT&T. Rather, the development of competition in long distance teaches that wholesale inputs should be available on terms that preserve the incentive of new entrants to build their own facilities and of incumbents to serve the wholesale market. The Act prescribed a methodology to that end – resale – but six years ago the Commission saw fit to invent another that was never envisioned. It is time for the Commission to put to bed the “more is better” theory that spawned the UNE-P. That theory, borne out of good intentions, is not a path to meaningful competition; it is a path that has led, and will continue to lead, the telecommunications and technology industries to recession, bankruptcies, and an ever-accelerating race to the bottom. It may offer some short-term benefit through regulatorily manufactured discounts, but it does so at a heavy price – inefficient entry, less facilities-based competition, less investment, and a less healthy industry.

4. The CLECs contend that maximum unbundling will not deter facilities-based investment because they will always prefer using their own facilities rather than leasing them from the incumbents, wherever it is feasible to do so. As an initial matter, it is worth noting that the Supreme Court rejected that exact argument in *Iowa Utilities Board*, noting that it “allows

entrants, rather than the Commission, to determine whether . . . the failure to obtain access to nonproprietary elements would impair the ability to provide services.”⁸⁰

In any event, the argument is factually unsound. It may be true that, all else being equal, competitors prefer to use their own facilities. But all else is hardly equal. Carriers will always consider the risk and cost of provisioning facilities, and the availability of UNEs skews this calculus, making reliance on the ILEC network more attractive than self-provisioning, even when it would be efficient for carriers to invest in their own facilities.⁸¹

Consider first the question of cost. UNEs are provided at TELRIC rates, which represent the forward-looking costs of an optimally efficient competitor using state-of-the-art equipment. Because, among other things, TELRIC is designed to capture ILEC scale economies, UNE rates are necessarily lower than the cost of self-provisioning. As one Wall Street analyst put it, “UNEs are priced below cash operating cost, and radically below total operating cost including depreciation and amortization.”⁸² This cost difference is a factor that any rational CLEC must consider when deciding whether to build or lease, and it serves to skew that decision in favor of leasing. As Commissioner Abernathy has explained, “‘cost-based’ rates are, . . . in some cases, based on a model that makes unrealistic economic assumptions and accordingly turn out to be *below* actual cost.”⁸³ As a result, she observes, “[i]n striving to stimulate *some* form of local telephone competition, by creating expansive resale and unbundling opportunities, we have adopted rules that have failed to engender, and may have actually hampered, *facilities-based*

⁸⁰ 525 U.S. at 389.

⁸¹ Shelanski Decl. ¶ 21 (Attach. D to SBC Comments).

⁸² Anna-Maria Kovacs, Commerce Capital Markets, *The Status of 271 and UNE-Platform in the Regional Bells’ Territories* (Apr. 15, 2002).

⁸³ Abernathy, *My View from the Doorstep of FCC Change*, 54 Fed. Comm. L.J. at 206-07.

competition – which is the most viable strategy in the long term and the one most likely to benefit consumers.”⁸⁴

As noted, recent state decisions have exacerbated this problem and accentuated the bias against facilities investment. Instead of correcting “residential retail rates and costs [that] are far out of sync,” regulators are lowering UNE prices even further to make the UNE-P more attractive to CLECs.⁸⁵ In other words, instead of eliminating the implicit subsidies in the ILECs’ regulated rate structure, state commissions are opting to distort TELRIC prices to promote the appearance of competition with UNE-P entry.⁸⁶ Carriers are urging the state commissions along this path, agreeing to providing residential service only if TELRIC rates are lowered even further. AT&T, for example, threatens that it will “only deploy UNE-P service in states where public utility commissions require incumbents to offer UNEs at low enough rates.”⁸⁷ According to AT&T, “the ILEC loop . . . needs to be priced and provisioned in a manner that permits competition.”⁸⁸ Thus, AT&T urges state commissions to work backward in pricing UNEs, asking states commissions to determine what rate will entice CLEC entry instead of focusing on costs. When the state “get[s] the UNE economics right” – *i.e.*, when the rates are set low enough to the CLECs’ liking – CLECs like AT&T enter the market.⁸⁹

⁸⁴ *Id.*

⁸⁵ Kovacs, *supra* note 82. “[R]egulators are forcing the RBOCs to wholesale their network at rates that are significantly below the costs that the financial community looks at.” *Id.*

⁸⁶ See John Haring & M. Shooshan, Strategic Policy Research, *Reorienting Regulation: Toward a More Facilities-Friendly Local Competition Policy* at 27-34 (Apr. 3, 2002) (Attach. A to Qwest Comments).

⁸⁷ *AT&T Considers Making Purchases from ‘Bone Pile’ of Distressed Assets*, TR Daily, Apr. 24, 2002; see also Glenn Bischoff, *Armstrong: AT&T Will ‘Greatly Expand’ Local Offering Pending States’ Actions*, Telephony Online, June 11, 2002, at 1 (according to AT&T Chairman and CEO C. Michael Armstrong, AT&T “would be able to offer competitive local residential service to more than half of the Bell companies’ territories by the end of 2002,” but only if state regulators “lower[] the rates . . . for unbundled network elements”).

⁸⁸ Letter from James W. Cicconi, AT&T, to Michael K. Powell, Chairman, FCC, at 3, CC Docket No. 01-338 (FCC filed Apr. 4, 2002).

⁸⁹ *AT&T Considers Making Purchases from ‘Bone Pile’ of Distressed Assets*, *supra* note 87.

But these CLECs enter by piggybacking off the facilities of the ILECs, not by investing in their own facilities, “even where, absent the unbundling option, the entrant would have found it economical to build its own facilities.”⁹⁰ They do so, moreover, in a way that takes advantage of the failure of states to rebalance rates: by targeting high-volume, low-cost customers.⁹¹ Thus, “[u]nbundling should not . . . be viewed as a harmless policy for fostering competition or as a mere back-up to more conventional means of competitive entry. The back-up can become the primary path and in so doing cause important social benefits to be lost.”⁹²

Another factor that tips the balance towards leasing, rather than building, is risk. It goes without saying that it is less risky to lease a facility than to build it. That is not a bad thing, in and of itself, but it is fatuous for CLECs to pretend that this consideration has no bearing on whether a carrier will build its own facilities or use UNEs when available.

Considerations of risk are particularly important in the context of new investment in advanced services (precisely the investment that the Commission has been charged to promote in section 706 of the Act). Broadband investment is particularly risky. The costs are high and demand is yet unproven. Many even argue that the lower-than-expected “take rate” for broadband is indicative of a fundamental demand problem – a view to which SBC does not subscribe but which underscores the risk associated with broadband investment. The risk is heightened further by the presence of significant intermodal competition and the head start these intermodal competitors have obtained over incumbent LECs in the broadband market. In this context, it is hard to imagine why any rational CLEC would take the risk of deploying its own facilities when it can free-ride on the investments of others. And, as we discuss in the next

⁹⁰ Shelanski Decl. ¶ 21.

⁹¹ Huyard, *supra* note 63.

⁹² Shelanski Decl. ¶ 5.

section, ILECs will likewise be disinclined to invest significantly in broadband facilities when all the risk is privatized, but the potential benefits (if the investment pays off) are socialized by a cost-based UNE regime.

5. Finally, AT&T and other CLECs attempt to divert the Commission's attention from the disincentives created by unbundling by claiming that "[t]he problem in the CLEC sector has not been *reluctance* to invest in facilities, but excessive enthusiasm in doing so."⁹³ They point to recent CLEC bankruptcies as proof that too much facilities-based investment, too soon, will harm competition.

As an initial matter, much of the investment (and consequent bankruptcy) has been in long-haul capacity that is unrelated to UNEs. The CLECs that flooded the market in the late 1990s were enticed by "the promise of limitless demand for data communications" and the \$1.2 trillion in capital Wall Street was throwing at their feet.⁹⁴ They built long-haul fiber-optic facilities in anticipation of demand that did not materialize (in part because regulation diminished the deployment of broadband in the last mile).⁹⁵ It is not the role of government to protect companies from such miscalculations.

Even with respect to local services, the lesson to be learned from recent CLEC failures is not that facilities-based investment should be deterred by making UNEs available. Quite the contrary. The lesson is that the Commission should avoid an excessive unbundling regime that

⁹³ AT&T Comments at 50; *see, e.g.*, Talk America Comments at 12-14.

⁹⁴ Bill Mann, *WorldCom's Hairy Ride* (Apr. 24, 2002), at <http://www.fool.com/portfolios/rulemaker/2002/rulemaker020424.htm>.

⁹⁵ *See, e.g.*, Simon Romero, *Once Bright Future of Optical Fiber Dims*, N.Y. Times, June 18, 2001, at A1; Robert Preston, *Carriers Must Show Customers the Way to Broadband*, InternetWeek.com (May 4, 2001) ("The bandwidth glut we've all been hearing about is more like a rut, with last-mile connectivity still in the narrowband dark ages while long-haul routes brim with fiber optic capacity."), at <http://www.internetweek.com/columns01/rob050401.htm>; Will Wade, *Optical Broadband Demand Could Hit a Wall*, Elec. Eng'g Times, May 14, 2001 ("There is a glut of bandwidth in the core. . . . But the problem is that there is a bottleneck in the edge. . . . [A]bout 90 percent of [installed long-haul] fiber sits unused, because there is not enough traffic across the network.") (internal quotation marks omitted).

undermines (and devalues) the investments made by facilities-based competitors. By making UNEs both ubiquitous and cheap, the Commission effectively “wrote down” the value of these investments, subjecting them to competition from carriers that had built nothing of their own and whose cost structures were determined largely in TELRIC proceedings, rather than the market. That is not a recipe for sustainable facilities-based competition or for a healthy industry.

Commissioner Abernathy for one has recognized the folly of too much unbundling. She recently attributed the problems in the telecommunications industry today, at least in part, to excessive entry fostered by too much unbundling. As she put it, the Commission’s initial efforts at unbundling were designed, not to foster investment, but to stimulate rapid entry by a multitude of carriers – even inefficient ones.⁹⁶

The result of this policy was that scores of companies all raced to capture the same high-volume business customers, even though that limited customer base could not support the multitude of CLECs that sought to exist solely on those revenues. Thus, although CLECs collectively succeeded in capturing an enormous number of access lines from ILECs – ILECs are for the first time in memory experiencing a *decline* in access lines and revenues, with CLECs now serving up to 20 percent of the BOCs’ switched access lines – a number of those CLECs that should not have entered the market in the first place have not survived. Even more important, by capturing customers through arbitrage opportunities created by cheap UNEs, they have dragged facilities-based investors, with otherwise sound business plans, down with them.

Indeed, the recent spate of bankruptcies makes it all-the-more important that the Commission place rational limits on the availability of UNEs. These bankruptcies have created a ready source of cheap capacity that will undoubtedly put downward pressure on market prices. As one widely quoted analyst puts it, “bankruptcy does not necessarily eliminate [supply]; it only

⁹⁶ Comm. Daily, July 10, 2002, at 4-5.

resurrects it on competitive steroids.”⁹⁷ Carriers that have incurred the debt necessary to build their own networks will accordingly see their facilities devalued by the existence of debt-free carriers that have purchased their assets out of bankruptcy, or that have themselves restructured in Chapter 11. Widespread availability of UNEs would only devalue those facilities further.

The tightening of the financial markets accordingly does *not* teach that facilities-based investment should be discouraged. Rather, this industry experience teaches that the Commission should avoid creating an expansive unbundling regime that promotes inefficient entry and undermines facilities investment. A growing chorus of industry observers agrees that now is the time for the Commission to “take a hard look at policies that have made the current slump worse, and that interfere with recovery.”⁹⁸ The Commission would hurt the long-term recovery of the telecom industry by propping up individual competitors through subsidies in the form of unbundling requirements. “This . . . would only prolong the pain, freeze the industry into inefficient models, and create a continuing demand for intervention.”⁹⁹ Instead, the Commission must “reduce constraints on investment in broadband services – especially excessive unbundling rules” because “these rules bottleneck recovery.”¹⁰⁰ It is to the Commission’s credit, these experts have noted, that it has a number of proposals, including this proceeding, to remove these barriers. But proposals are only that, proposals. Now is the time for the Commission to follow through.

⁹⁷ Scott C. Cleland, Precursor Group, *Telecom’s Debt Spiral* (Feb. 5, 2002).

⁹⁸ James L. Gattuso, *The Telecom Rout: Transformation and Fluctuation* (Apr. 26, 2002), at <http://www.cei.org/gencon/016,02982.cfm>.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

B. The Greater the Unbundling Obligations, the Greater the Disincentive for ILEC Investment.

CLECs are likewise fundamentally mistaken when they claim that unbundling does not hamper ILEC investment incentives. Indeed, their position in this regard is one they do not even believe themselves. Thus, for example, AT&T's claim that UNEs do not impair ILEC investment incentives¹⁰¹ is a far cry from AT&T's recognition elsewhere of the "universally accepted economic and public policy" principle that forced access discourages investment.¹⁰² Or its concession that "[t]he prospect of regulation alone is enough to dampen investment." Or its concern that "[u]nnecessary access regulation would also deter innovation," which would be "devastating to the deployment of broadband services."¹⁰³ Or its prior acknowledgement that

[t]he imposition of a rigid, forced access mandate would stunt the ability of companies to adjust to technological advances and changing consumer needs, discourage innovation, preclude parties from entering agreements tailored to their particular needs, inhibit the investment necessary to the continued development of new technologies and rapid deployment of broadband capabilities, and divert substantial resources to technical and operational problems stemming from regulatory compliance.¹⁰⁴

AT&T's chairman has likewise recognized the costs of unbundling in other contexts. As he observed, "[n]o company will invest billions of dollars to become a facilities-based . . . services provider if competitors who have not invested a penny of capital or taken an ounce of risk can come along and get a free ride on the investments and risks of others."¹⁰⁵

Members of this Commission have made similar observations. Commission Abernathy has noted that:

¹⁰¹ See, e.g., AT&T Comments at 65 (ILEC claims that "existing unbundling obligations impair their own incentives to invest in network facilities" are "baseless").

¹⁰² AT&T Open Access Comments at 42, 68-69.

¹⁰³ *Id.* at 69.

¹⁰⁴ *Id.* at 68.

¹⁰⁵ C. Michael Armstrong, Chairman and CEO, AT&T, Remarks at the Washington Metropolitan Cable Club, Washington, D.C. (Nov. 2, 1998), at <http://www.att.com/speeches/item/0,1363,948,00.html>.

Unless properly circumscribed, forced unbundling can impose costs and distort investment incentives. Unbundling requirements that are too broad destroy an incumbent's incentive to invest in facilities. This is because incumbents will avoid risking capital on new infrastructure if rivals can piggyback on their facilities risk-free. By the same token, new entrants will have diminished incentives to invest in their facilities if the incumbent's network is readily available at below cost rates.¹⁰⁶

Commissioner Martin has also observed that the Commission "should do its part to remove the requirements that [ILECs] lease network pieces to competitors at super-efficient prices, which discourage both incumbent investment and facilities-based competition."¹⁰⁷ Chairman Powell has likewise noted that "legal restraints can retard deployment of new services."¹⁰⁸

AT&T suggests that competitive pressure exerted by UNE-enabled CLECs spurs new investment by ILECs in both narrowband and broadband facilities. But that bald assertion is both illogical and without empirical support. It is illogical because ILECs bear the entire risk of such new investment, and yet any potential benefits are socialized. If the investment is unsuccessful, the ILEC bears the entire loss. If the investment is successful, then CLECs may share the success (without risk or capital contribution) at cost-based rates. No rational ILEC will have an incentive to invest in such an environment.

It is without empirical support because AT&T's marketplace evidence claiming to show that UNEs do not impair ILEC incentives is just as flawed as its analysis of CLEC incentives. AT&T argues that, of the states with section 271 approval or for which an application is pending, the three states with the highest ILEC investment rates – Georgia, Texas, and New York – were also the states with the highest levels of UNE-P entry.¹⁰⁹ In particular, AT&T cites testimony by

¹⁰⁶ Abernathy, *supra* note 49.

¹⁰⁷ Kevin J. Martin, Commissioner, FCC, Remarks at the SUPERnet Conference (Jan. 23, 2002).

¹⁰⁸ Michael K. Powell, Chairman, FCC, *Digital Broadband Migration – Part II*, FCC Press Conference (Oct. 23, 2001).

¹⁰⁹ AT&T Comments at 66.

Robert Willig, in which he compares ILEC investment rates in 1999 and 2000 in Georgia (a UNE-P state) with investment rates in 1999 and 2000 in Massachusetts (a state with little UNE-P competition).¹¹⁰ The Georgia investment rate during that period, he notes, was much higher than the Massachusetts rate.¹¹¹ He conducts a similar comparison between ILEC investment rates in 1999 and 2000 in Texas and New York (UNE-P states) and ILEC investments rates in those same years in California.¹¹² He observes that the investment rate in California was “far lower” than the rate in Texas and New York.¹¹³ This “anecdotal evidence,” he asserts, “suggests that UNE-P entry is a more significant impetus to ILEC investment than facilities-based entry.”¹¹⁴

The flaws in this analysis, like AT&T’s analysis of CLEC investment, are legion. For starters, while AT&T purports to attribute different investment rates during 1999 and 2000 to the UNE-P, the UNE-P was not even available until February 2000. That, in itself, is enough to discredit AT&T’s analysis, but there is far more. While AT&T purports to attribute different investment rates in the 13 states it selected to the UNE-P, those differences long preceded the availability of the UNE-P. For example, ILEC investment in Georgia exceeded that in Massachusetts, not only in 1999 and 2000, but also from 1996 to 1998.¹¹⁵ That difference thus could not have been attributable to the UNE-P as AT&T deceptively claims.

A similar purpose of “cooking the data” explains AT&T’s decision to confine its analysis to 13 states, as opposed to all states. There is no logical basis for singling out these states. There

¹¹⁰ AT&T’s Willig Decl. ¶ 109.

¹¹¹ *Id.*

¹¹² *Id.* ¶ 110.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ UNE-P and Investment at 9. This same flaw infects AT&T’s comparison between ILEC investment in California and investment in Texas and New York and all other 271 states. Here, too, AT&T takes a snapshot in time – 2000 – and argues that the different investment levels must therefore be explained by the UNE-P. In fact, the different levels of investment in these states in 2000 were part of a longstanding historical pattern. *Id.*

is, after all, no correlation between 271 states and states where CLECs are using UNE-P to a significant extent.¹¹⁶ But there is a strategic – and deceptive – reason for mining the data in this way. If AT&T had looked at the 15 states with the most significant UNE-P use – where UNE-P lines represent three percent or more of the BOC access lines – it would have found that there is *no correlation* between UNE-P levels in these states and ILEC investment.¹¹⁷ Or if AT&T had looked at all 48 continental states, it would similarly have found *no correlation*.¹¹⁸ Only by focusing on this odd grouping does AT&T create the appearance that ILEC investment increases with the UNE-P.

Market analysts certainly have not been fooled by the kind of selective, manipulated data AT&T submitted in this proceeding. They have noticed that the telecom sector is “on a capital-spending fast that could starve their already famished suppliers.”¹¹⁹ To be sure, UNEs are not the only reason for the current slow-down in capital expenditures. But they are playing a role. As noted at the outset, a recent report by the Gartner Group calls UNEs “the death knell for broadband.”¹²⁰ Similarly, as noted at the outset, a report by Cambridge Strategic Management Group estimates that complete deregulation in broadband (with no unbundling obligation) would lead to six times the investment in new facilities than would occur in an unbundled environment: a difference of more than \$39 billion over the next 10 years.¹²¹

Other analysts paint an equally bleak picture. Just last week, JP Morgan lowered earnings estimates on the Bell companies, predicting “flat EPS results for 2002 on negative-

¹¹⁶ *Id.* at 8.

¹¹⁷ *Id.* at Fig. 9.

¹¹⁸ *Id.* at Fig. 10.

¹¹⁹ Scott Moritz, *Telcos Serving Suppliers a Big Goose Egg* (Apr. 25, 2002), at http://www.thestreet.com/_intuit/tech/scottmoritz/10019253.html.

¹²⁰ *Gartner Report* at 8-9.

¹²¹ *CSMG Report* at 11-13.

trending operating results” and an anemic one percent increase in EPS in 2003, based, not on revenue growth, but on expected “aggressive cost-cutting measures,” including further workforce reductions.¹²² “The major catalyst” for this bleak forecast is “significant earnings pressure due to the loss of retail lines to UNE-based competition.”¹²³ “While the Bells lose roughly 60% of the revenues when they lose a line to a UNE-P based competitor, we estimate that they retain 95% of the costs.”¹²⁴

Under the circumstances, any suggestion that UNEs promote investment by the BOCs is sheer folly. The real question is not whether UNEs reduce ILEC investment – unquestionably they do – but whether UNEs threaten to undermine the stability of the entire industry. That is no idle question. As states continue to reduce UNE rates to “confiscator[ily] low” levels, even in the face of substantial facilities-based competition, SBC and other ILECs have been hemorrhaging. As noted at the outset, SBC has been losing more than 200,000 lines per month to the UNE-P – preliminary numbers show 270,000 lines lost to UNE-P in June alone – and the number is increasing rapidly every month.¹²⁵ That these lines tend to be among the minority of lines that are profitable makes the losses all the more difficult to bear. Taking into account wireless and broadband migration, other competitive losses, and the effects of the current economic downturn, SBC has been losing more than 400,000 retail access lines, all told, per month in recent months. Those kinds of losses cannot be sustained over time. Certainly, SBC has no quarrel with line losses that are attributable to real competition, but there is absolutely no legitimate basis for regulators to force additional market share losses through the UNE-P. The

¹²² *JP Morgan July 2002 Industry Update.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Other ILECs may be unwilling to be so open with numbers such as these for fear of the impact on their already-battered stock prices.

effects of these short-sighted policies – which, when all is said and done, cater primarily to the interests of two ailing carriers, AT&T and WorldCom – will have ripple effects throughout the entire industry. Already, one analyst warns of a “telecom financial debacle” as former stalwarts of the industry, such as Lucent, Nortel, Corning, JDS Uniphase, Ciena, and Sycamore, all struggle to avoid bankruptcy.¹²⁶

The suppliers themselves have informed the Commission in this proceeding that the excessive unbundling requested by the CLECs threatens to dampen ILEC incentives to invest in new facilities. A coalition of broadband manufacturers agrees that “[b]asic economic principles dictate that the imposition of Section 251 unbundling obligations on new, last-mile facilities for the benefit of other carriers discourages ILEC investment in broadband deployment because it reduces the value of the ILECs’ investment.”¹²⁷ Alcatel has filed comments to the same effect, asking the Commission to create a “safe harbor” of network elements – including broadband facilities – that will not be subject to unbundling, in order to promote investment in new facilities.¹²⁸ Next Level, another manufacturer of advanced services facilities, likewise argues that ILEC “roll-out of broadband facilities and services is being inhibited – not by any technological shortcoming – but by the panoply of rules under review in these proceedings that have the effect of discouraging ILECs from purchasing and deploying advanced broadband facilities.”¹²⁹ And TechNet, a group that represents Cisco, 3com, and other equipment makers,

¹²⁶ Precursor Group, *The “Insolvency Zone”: the Bankrupting of the U.S. Telecom Sector*, May 20, 2002.

¹²⁷ High Tech Broadband Coalition Comments at 28. *See also id.* at 29 (“Requiring ILECs to share the rewards of broadband deployment (*i.e.*, to unbundle network elements used in the provision of broadband service) with carriers that incur none of the risks of investing in new, last-mile broadband facilities reduces the ILECs’ expected return on investments and thus serves as a disincentive for ILEC investment in new or upgraded facilities.”).

¹²⁸ Alcatel Comments at 14. Alcatel’s Vice President of Wireline Marketing has also warned that broadband unbundling obligations would prompt the Bell companies to “totally hold[] back” on new broadband investment. *See* Carol Wilson, *All Dressed Up with Nowhere to Go*, Net Economy (Mar. 5, 2001), at <http://www.theneteconomy.com/article/0,3658,s=905&a=8780,00.asp>.

¹²⁹ Next Level Comments at 2.

has similarly emphasized that government policy should “reduce regulation[,]” and thus “encourage new investment in broadband infrastructure.”¹³⁰

The suppliers and manufacturers that have filed these comments have an interest only in promoting the deployment of broadband facilities, for they profit when companies invest in the facilities they produce. They are betting their financial future on the fundamental truth that unbundling deters investment. In contrast, the CLECs prefer to stake their future on risk-free UNEs instead of investing in facilities of their own, so their incentive in this proceeding is to encourage as much unbundling as possible. The evidence makes clear which position the Commission must believe: to benefit consumers and competition – not the preferred business plans of individual companies – it must acknowledge that unbundling comes at a high price. It should therefore be ordered only when its benefits outweigh its costs.

II. THE CLECS’ PROPOSAL FOR MAXIMUM UNBUNDLING IS WRONG AS A MATTER OF LAW.

Whatever the CLECs say to the contrary, the 1996 Act reflects Congress’s judgment that unbundling has costs. Indeed, the very purpose of section 251(d)(2) is to prevent excessive unbundling and the costs it brings. The D.C. Circuit has made resoundingly clear that the Commission is not at liberty to embrace the maximum unbundling agenda of the CLECs. The court rejected in no uncertain terms the notion that “more unbundling is better” because “Congress did not authorize so open-ended a judgment.”¹³¹ “[U]niversal rules encompassing as many elements as possible,” the court explained, stimulate “completely synthetic competition” that fails to fulfill the Act’s purpose.¹³² Indeed, such rules are at war with the goals of the Act,

¹³⁰ Cisco Systems News Release, *TechNet CEO’s Call for National Broadband Policy* (Jan. 15, 2002), at http://www.newsroom.cisco.com/dlls/corp_011502b.html.

¹³¹ *USTA*, 290 F.3d at 425.

¹³² *Id.* at 424.

for they impose on society significant costs. “Each unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities.”¹³³

Unbundling is reserved, as the Supreme Court stated, for “bottleneck facilities” that are “very expensive to duplicate” and yet are still “necessary to provide a desired telecommunications service.”¹³⁴ The whole point of an unbundling obligation is to give competitors access to these bottleneck facilities so that they can “build their own versions of less expensive facilities that are sensibly duplicable.”¹³⁵

In applying this standard, moreover, the Commission cannot “rely on cost disparities that are universal as between new entrants and incumbents in *any* industry.”¹³⁶ As the Court explained, “average unit costs are necessarily higher at the outset for any new entrant into virtually any business.”¹³⁷ “A cost disparity approach that links ‘impairment’ to universal characteristics, rather than ones linked (in some degree) to natural monopoly, can hardly be said to strike” the balance that the Act requires.¹³⁸ Instead, the Commission must focus on “cost differentials based on characteristics that would make genuinely competitive provision of an element’s function wasteful.”¹³⁹ Again, in the words of the Supreme Court, unbundling applies only to “bottleneck facilities,” not to those “sensibly duplicable” elements that new entrants can and should be expected to provide on their own.

¹³³ *Id.* at 427.

¹³⁴ *Verizon*, 122 S. Ct. at 1672 & n.27.

¹³⁵ *Id.* at 1668.

¹³⁶ *USTA*, 290 F.3d at 427.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

In short, the D.C. Circuit directed the Commission to take a *balanced* approach to unbundling – one that, like the approach described in SBC’s opening comments, orders access to UNEs only when the “cost characteristics of an ‘element’ render it . . . unsuitable for competitive supply.”¹⁴⁰ In conducting this analysis, the Commission must, first and foremost, adopt rules that disallow UNEs wherever alternatives exist – *i.e.*, wherever there is no impairment. But the Commission’s analysis cannot end there. The absence of competitive facilities in a particular market may or may not be the result of impairment. To the extent competitive facilities have not been deployed in a particular market, therefore, the Commission must attempt to determine why, and it must differentiate between true impairment and factors that have nothing to do with impairment. It may be simply that competitors have turned to other markets first. Or it may be that competitors have been kept from the market by unattractive retail rates. All such possibilities must be explored and analyzed so that unbundling is ordered only where true impairment can be found.

The CLECs in this proceeding anticipate that they will not fare well under this statutorily mandated inquiry. Accordingly, they raise a series of arguments designed to discourage the Commission from following it. None of these arguments has merit.

A. The Commission Cannot Bootstrap UNEs onto the Unbundling List in Order To Preserve the UNE-P.

A multitude of CLECs plead with the Commission to retain the “UNE-P.”¹⁴¹ We have already discussed why such a policy would discourage facilities-based investment. It is also worth stressing that any attempt to bootstrap UNEs on to the unbundling list in order to preserve the UNE-P is plainly unlawful.

¹⁴⁰ *Id.*

¹⁴¹ *See, e.g.*, Association of Communications Enterprises Comments at 21-22; Business Telecom Comments at 2-12; AT&T Comments at 231; WorldCom Comments at 25; Eschelon Comments at 26-27; General Communications Comments at 48; Navigator Comments at 6-7; New South Comments at 21-22; Talk America Comments at 6; UNE Platform Coalition Comments at 24-25; Z-Tel Comments at 22-24; CompTel Comments at 86.

At the outset, it is critical to remember what the UNE-P is. The UNE-P is a combination of various elements that the Commission previously ordered unbundled. As AT&T has conceded, it is not a “different animal” that is somehow immune from “the rules and regulations established by the FCC and upheld by the United States Supreme Court.”¹⁴² Thus, once one of these elements fails to pass the “impair” test, the UNE-P can no longer be mandated. Indeed, it is for this reason that the Supreme Court noted in *Iowa Utilities Board* that the whole question of the “UNE Platform” could become “academic” once the Commission properly applied the “impair” test of section 251(d)(2).¹⁴³ Each and every element of the platform must *independently* satisfy section 251(d)(2), and, “[i]f the FCC on remand makes fewer network elements unconditionally available through the unbundling requirement, an entrant will no longer be able to lease every component of the network.”¹⁴⁴

Many commenters in this proceeding, however, have ignored the Act’s and the Supreme Court’s mandate. Instead of analyzing independently the individual elements that comprise the UNE-P, they insist that the UNE-P must be made available and then work backward in search of a rationale to support that claim. The Act simply does not countenance this approach.

It is no answer to this statutory argument to suggest that UNE-P entry might, in the short-term, bring lower prices to consumers. Congress did not intend to use *regulation* to force down prices. Rather, the goal of the Act is to promote competition and to allow *market forces* – not regulatory fiat – to lower prices and increase consumer choice. Congress made plain its goal to

¹⁴² AT&T’s Post-Hearing Brief, *Generic Proceeding to Establish Long-Term Pricing Policies for Unbundled Network Elements*, Docket No. 10692-U, at 8 (Ga. Pub. Serv. Comm’n filed Aug. 4, 1999).

¹⁴³ *Iowa Utils. Bd.*, 525 U.S. at 392-93.

¹⁴⁴ *Id.* at 392. Section 251(c)(3) provides further support for this reading. Under section 251(c)(3), if a network element satisfies section 251(d)(2) and must be unbundled, the ILEC must provide that element “in a manner that allows requesting carriers to combine [that] element[] in order to provide . . . telecommunications service.” 47 U.S.C. § 251(c)(3). Thus, it is only *after* an element has satisfied the section 251(d)(2) threshold that the issue of combination comes into play.

“promote competition and reduce regulation.”¹⁴⁵ It was those steps – not a mandatory subsidy from ILECs to CLECs – that Congress thought would lead to “lower prices and higher quality service for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.”¹⁴⁶

The UNE-P is at odds with this goal. As Chairman Powell has explained, using UNE-P “is not functionally different from reselling service.”¹⁴⁷ Its only use, then, is as a substitute for resold service, where a state has priced it at a manner that induces the CLEC to rely upon it instead. It thus promotes “synthetic competition” through synthetic pricing. But the 1996 Act, as the D.C. Circuit made clear, is about promoting *real* competition and the *real* benefits it brings.¹⁴⁸

The whole purpose of the UNE regime – as opposed to resale – is to prompt competitors to mix their own facilities with bottleneck facilities, not to piggyback entirely off the ILEC network. The Supreme Court recently reiterated this point, noting that entrants “may need to share some facilities that are very expensive to duplicate (say, loop elements) in order to be able to compete in other, more sensibly duplicable elements.”¹⁴⁹ It is precisely those “more sensibly duplicable elements” that the CLECs must provide on their own.

¹⁴⁵ Telecommunications Act of 1996, Pub. L. No. 104-104, Preamble, 110 Stat. 56.

¹⁴⁶ *Id.*

¹⁴⁷ Dawson & Sunderland, *supra* note 1.

¹⁴⁸ The UNE Platform Coalition suggests that, even where CLECs use the UNE-P, they bring some of their own facilities (in the form of OSS, billing systems, etc.) to the table and thus “add value” to ILEC facilities. UNE Platform Coalition Comments at 5-8. At most, such deployment allows CLECs to provide a few adjunct features or customer service options. They are still not competing in the core facilities used to provide network service. Moreover, unbundling is not a prerequisite to the provision of such “innovations.” CLECs could provide them even more readily using their own switches. So this is not an argument in favor of preserving the UNE-P, in the absence of impairment in the provision of one or more elements (such as switching) of the UNE-P.

¹⁴⁹ *Verizon*, 122 S. Ct. at 1672 & n.27.

B. The “At a Minimum” Language Gives the Commission Ample Authority To Consider the Effects of Unbundling on Competition.

In addition to its impairment analysis, the Commission has authority to decline to order unbundling whenever doing so would cause competitive harm. A number of CLECs, however, contend that the Commission lacks the legal authority to consider the effect unbundling will have on competition. For instance, AT&T claims that “[w]hile Congress also allowed the Commission to consider other factors *along with* the ‘necessary’ and ‘impair’ standards, it certainly did not expect or permit the Commission to decide that the mandatory provision of UNEs was itself a threat to competition.”¹⁵⁰ CompTel likewise claims that the Commission is foreclosed from “consider[ing] whether requiring ILECs to unbundle a network element may deter investment by both ILECs and other carriers.”¹⁵¹

It is nothing short of preposterous for the CLECs to argue that the Commission cannot consider as part of its unbundling analysis whether unbundling will harm competition. Indeed, the D.C. Circuit just reversed the Commission for its “naked disregard of the competitive context” in which it made an unbundling decision. The entire point of section 251 is to promote competition and benefit consumers. If unbundling had no harmful consequences, section 251(d)(2) would not be in the Act at all. It is there, however, precisely to ensure that the harms and benefits of unbundling are weighed against each other. If there is *any* additional factor the Commission can consider beyond the “necessary” and “impair” test – as AT&T concedes and the Commission already found in interpreting the “at a minimum” language – surely it is whether unbundling in a particular instance will benefit or harm competition.

AT&T claims, however, that it is “fantasy” to suggest “that a CLEC that is impaired without access to a UNE will nonetheless press on and build facilities if that UNE is

¹⁵⁰ AT&T Comments at 41; *see also* WorldCom Comments at 52.

¹⁵¹ CompTel Comments at 18.

withheld.”¹⁵² AT&T further argues that the “suggestion that the availability of UNEs might discourage CLECs from investing in their own facilities” is “nonsense.”¹⁵³ Thus, according to AT&T, unbundling will always help competition, and never harm it.

As to the latter claim, the market evidence discussed above thoroughly undercuts the argument that UNEs do not discourage investment, as does the D.C. Circuit’s recent opinion. As to the former point, AT&T completely ignores intermodal competition. Even if an individual CLEC could be deemed impaired without access to an unbundled network element, that does not mean that the benefits of unbundling will always outweigh the costs. In markets with intermodal competition, it is likely to be the opposite. While some CLECs, with limited business plans, may be impaired without access to the ILEC phone network, a host of other companies might be providing the same service by investing in other technologies. Unbundling could risk stifling the development of these new technologies, especially in nascent markets. Congress fully expected the Commission to consider the effect of unbundling on investment and the development of technology. And it also anticipated that the Commission would need to consider how unbundling would intersect in markets with intermodal competition. As Senator Leahy explained in his endorsement of the 1996 Act, Congress intended to “update our laws to take account of the blurring of the formerly distinct separation of cable, telephone, computer, and broadcast services.”¹⁵⁴

C. Section 706 Requires the Commission To Consider the Impact of Its Unbundling Rules on Broadband Investment.

The importance of the competitive context is nowhere clearer than with respect to advanced services. In section 706 of the 1996 Act, Congress directly instructed the Commission

¹⁵² AT&T Comments at 42.

¹⁵³ *Id.* at 45.

¹⁵⁴ 141 Cong. Rec. S8067 (daily ed. June 9, 1995) (Sen. Leahy).

to use its regulatory jurisdiction to promote competition and to encourage deployment of broadband facilities. Congress made plain that it was charging the Commission to “encourage” the deployment of “advanced telecommunications capability” generally, not to favor any particular technology used to deliver that capability.¹⁵⁵ Congress expressly defined the term “advanced telecommunications capability” to include “high-speed, switched broadband telecommunications capability” “*without regard to any transmission media or technology.*”¹⁵⁶ The Commission’s duty here is thus to “remove barriers to infrastructure investment” for *all* broadband technologies;¹⁵⁷ it would be inconsistent with the Act to advance some technologies at the expense of others.

The Supreme Court has explained that section 251(d)(2) “requires the Commission to determine on a rational basis *which* network elements must be made available, taking into account the objectives of the Act.”¹⁵⁸ Broadband deployment is an objective so important that Congress saw fit to codify it in section 706. Thus, while the FCC must consider the impact on investment of any unbundling obligation, it has a separate and independent obligation to consider these costs in the context of broadband investment because of section 706.

D. The Requirements of Section 271 Are Irrelevant to the Proper Application of Section 251(d)(2).

In interpreting section 251, the Commission must again reject the argument that section 271 requires that switching, transport, and loops be made available at cost-based rates.¹⁵⁹ In the *UNE Remand Order*, the Commission made clear that:

¹⁵⁵ 47 U.S.C. § 157 note.

¹⁵⁶ *Id.* (emphasis added).

¹⁵⁷ *Id.*

¹⁵⁸ *Iowa Utils. Bd.*, 525 U.S. at 391-92.

¹⁵⁹ *E.g.*, Z-Tel Comments at 7-18.

In circumstances where a checklist network element is no longer unbundled, we have determined that a competitor is not impaired in its ability to offer services without access to that element. . . . Under these circumstances, it would be counterproductive to mandate that the incumbent offers the element at forward-looking prices. Rather, the market price should prevail, as opposed to a regulated rate which, at best, is designed to reflect the pricing of a competitive market.¹⁶⁰

The commenters in this proceeding have no response to this statement as a policy matter.

Instead, they attempt to manufacture a legal obstacle. They insist that section 271(c)(2)(B)(ii) prevents the Commission from considering this policy argument, because it requires

“[n]ondiscriminatory access to network elements in accordance with the requirements of section 251(c)(3) and section 252(d)(1).”¹⁶¹ They argue that the reference to section 252(d)(1) mandates that switching, transport, and loops be made available at cost-based rates.¹⁶² But section 252(d)(1) applies only to those elements that must be unbundled *pursuant to section 251(c)(3)*.¹⁶³

If an element need not be unbundled under section 251(c)(3), then neither the pricing provision of section 252(d)(1) nor section 271(c)(2)(B)(ii) applies. Accordingly, as the Commission previously held in the *UNE Remand Order*, if an element that is listed in the section 271 checklist need not be unbundled, it also need not be made available at cost-based rates.¹⁶⁴

¹⁶⁰ *UNE Remand Order*, 15 FCC Rcd at 3906, ¶ 473.

¹⁶¹ 47 U.S.C. § 271(c)(2)(B)(ii).

¹⁶² *See, e.g., Z-Tel Comments* at 8.

¹⁶³ 47 U.S.C. § 252(d)(1) (referring to “the just and reasonable rate for network elements *for purposes of subsection (c)(3)*”) (emphasis added).

¹⁶⁴ Indeed, as Verizon points out, these elements need not be made available on an unbundled basis *at all* once carriers are no longer impaired without access to them. The purpose of the checklist, as Verizon notes, is to demonstrate that the ILEC’s local network is open. If lack of access to switching, transport, or loops “would not impair CLECs’ ability to compete, then the local market must be considered open without mandatory access to those facilities.” *Verizon Comments* at 67. Section 10 of the Act permits the Commission to forbear from enforcing section 271 as long as the pertinent provision has been “fully implemented.” 47 U.S.C. § 160(d). “Where an element no longer meets the Section 251(d)(2) standard for unbundling, forbearance from enforcing the parallel checklist item satisfies the forbearance test.” *Verizon Comments* at 68.

III. SBC’S PROPOSED FRAMEWORK IMPOSES REASONABLE LIMITS ON UNBUNDLING THAT WILL PROMOTE FACILITIES-BASED COMPETITION.

Given the potentially harmful side effects of unbundling, the Commission must be careful to order ILECs to share pieces of their network only when the benefits of unbundling outweigh the costs. In this vein, SBC has proposed precisely the kind of framework that the Act and binding legal precedent demand. It recognizes and balances the costs and benefits of unbundling. There are four key components to this framework:

First, the Commission should not order unbundling of new investment. New entrants and incumbents alike stand on equal footing in deciding, *e.g.*, whether to bid on a new subdivision or otherwise construct new facilities to serve potential customers. The 1996 Act was focused on the legacy network (and even then only to the extent that that network contained “bottleneck” facilities), not on new investment. And it is new investment that is most likely to be deterred by ill-considered unbundling obligations. Incumbents will not shoulder the risk of investing in these facilities when they know that CLECs will share in the fruits of their labor. And CLECs will not make their own investments when the prospect of a risk-free ride on the investments of others is held out to them.

Second, the Commission must also make clear that facilities cannot be unbundled when those facilities are used to provide service in competitive markets. These markets assuredly include broadband, wireless, and interexchange services. The benefits of unbundling are non-existent in these instances, because these markets are *already* competitive without UNEs. Yet the costs are grave: UNEs will distort incentives and drive carriers away from investments and innovation and toward reliance on the TELRIC-priced ILEC network. As the D.C. Circuit has explained, “nothing in the Act” permits the Commission “to inflict on the economy” these sorts

of costs where there is no prospect of “bring[ing] on a significant enhancement of competition.”¹⁶⁵

Third, the Commission must tailor the UNE list to recognize the reality of facilities-based competition where it has already taken hold and to promote more of the same wherever it is economically feasible. This granular approach will ensure that UNEs are available in those situations where they will promote competition, but not where they will stunt competition that is developing without them.

Fourth, the Commission must preempt the states from undercutting this framework and unraveling the competitive progress it will bring. All of the Commission’s efforts will be for naught if states are permitted to add UNEs to the list. This is an instance where a national policy is necessary to ensure competitive development. Because of the importance of this issue, SBC will deal with it separately in Section IV.

SBC discussed at length each aspect of the framework in its opening comments. It will further elaborate on the framework below, responding and refuting the claims of the commenters who would instead have the Commission perpetuate a pervasive unbundling regime.

A. The Commission Should Not Unbundle New Investment.

Not unexpectedly, several CLECs in this proceeding seek to expand the UNE regime to cover new ILEC investment. If the ILECs are going to invest billions of dollars in new facilities, these CLECs want to be able to free ride on that investment.

It is equally unsurprising that the CLECs that make this bold request have little to say in support of their claim. Instead, they make vague allegations that these new investments would somehow be tied to the ILEC legacy network. For example, Sprint argues that incumbents should be required to unbundle new or overlay facilities because ILEC loop facilities were

¹⁶⁵ *USTA*, 290 F.3d at 429.

“initially constructed under the protection afforded a monopoly.”¹⁶⁶ As SBC explained in its initial comments, there can be no serious argument that the protected monopoly theory applies to new investment.¹⁶⁷ That theory is dubious even for legacy facilities, for SBC and other ILECs have been under price caps for many years. But whatever the merits of that theory with respect to the legacy network, there can be no argument that it applies to new investment. SBC no longer enjoys an exclusive franchise or any other state protection. Indeed, the Act *prohibits* it.¹⁶⁸ To say simply that the ILECs, at one time in the past, enjoyed protection under exclusive franchises says nothing about the rules under which they operate today.

Going forward, SBC and other ILECs have the same advantages and disadvantages as the CLECs. As the High Tech Broadband Coalition points out, “with respect to broadband, ILECs have no unfair competitive advantage based on their legacy networks” because broadband services are provided “using largely different electronics equipment and facilities than circuit-switched voice services.”¹⁶⁹ “[I]nvestment in new, last-mile broadband facilities does not constitute a legacy advantage because any competitor could make a similar investment.”¹⁷⁰ Corning makes the same point, noting that in the case of fiber-to-the-home deployment, “CLECs and ILECs operate on a level playing field, and ILECs possess none of the oft-cited advantages which lead to unbundling requirements.”¹⁷¹ Alcatel adds that ILECs and CLECs are also in “equal positions to compete for and construct” new networks in green field developments.¹⁷²

¹⁶⁶ Sprint Comments at 18.

¹⁶⁷ See SBC Comments at 13-20.

¹⁶⁸ See 47 U.S.C. § 253(a) (“No state or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”).

¹⁶⁹ High Tech Broadband Coalition Comments at 34.

¹⁷⁰ *Id.* at 37.

¹⁷¹ Corning Comments at 10.

¹⁷² Alcatel Comments at 16.

If unbundling of these facilities is required, however, ILECs and CLECs alike will have diminished incentives to deploy new facilities. ILECs are motivated to deploy new facilities by the promise of a reward. If, as Justice Breyer has explained, the ILEC must share “the fruits of value-creating investment,” the ILEC’s incentive to build the new facility in the first place will evaporate.¹⁷³ In addition to limiting the potential upside of new investment, unbundling also increases the costs of that investment, by forcing design modifications that allow network sharing.¹⁷⁴ This further dampens ILEC incentives to deploy these facilities. CLECs, too, will not invest in new facilities if they know they can free ride on the capital outlays of the ILECs.

The Act’s impairment test recognizes the distinction between the legacy network and new facilities. A CLEC cannot be “impaired” today by its inability to access facilities that no one – ILEC or CLEC – has yet deployed, and which every carrier has the same opportunity to deploy. The “at a minimum” provision of section 251(d)(2) similarly provides the Commission with authority to shield new investment from its unbundling regime. The competitive costs of unbundling in this context are extraordinary, and there is no corresponding benefit – let alone a benefit that outweighs the harm.

The CLECs try to avoid this rational result by claiming that it would be “impossible to segregate the ‘broadband’ and ‘legacy’ portions of the ILECs’ physical networks in any meaningful way.”¹⁷⁵ SBC, however, has proposed at least two instances where new facilities are readily distinguishable from existing facilities.

First, the Commission should make clear that facilities used in “green field” scenarios – *i.e.*, facilities deployed to serve new residential and commercial areas – are not subject to

¹⁷³ *Iowa Utils. Bd.*, 525 U.S. at 428-29 (Breyer, J., concurring in part and dissenting in part).

¹⁷⁴ See, e.g., *The Impact of Potential Unbundling Requirements on SBC’s Project Pronto Architecture* (Attach. C to SBC Comments).

¹⁷⁵ CompTel Comments at 42.

unbundling. By definition, these developments are not being served by *any* existing facilities. Thus, serving these areas necessarily involves investment in new infrastructure, which ILECs and CLECs are equally positioned to offer.

The same is true of all new investment in packet technologies and networks. These facilities are being deployed *in addition to* the legacy network, and they are readily distinguishable from existing facilities. Although AT&T has attempted to blur this very bright line by asserting that ILEC fiber-to-the-curb systems are “purely incremental to the ILECs’ existing monopoly networks” and that “there is no sense in which these are ‘new’ wires,”¹⁷⁶ AT&T’s argument is patently false. SBC provides broadband services today using a distinct packet network that runs alongside its legacy, circuit-switched network. And the network it proposes to construct – using Broadband Passive Optical Network (“BPON”) technology and bringing fiber to the home – likewise would overlay the existing circuit-switched network. The diagram on page 45 of SBC’s initial comments shows how these facilities are overbuild facilities that are readily distinguishable from the existing network.

AT&T also argues that ILECs should be required to deploy new facilities simply by virtue of the fact that the ILEC has “a huge customer base, a ubiquitous network, and the ability to use its existing monopoly base of assets to generate construction funds.”¹⁷⁷ This view is contradicted by the plain language of section 251(d)(2). The question under section 251(d)(2) is whether CLECs are *impaired* without access to the ILEC network, not whether ILECs have a larger network or can raise funds more easily. The Supreme Court made clear that the inquiry under section 251(d)(2) focuses on the CLEC’s *ability* to provide a service, not whether access to the ILEC network would make it easier or cheaper to do so.¹⁷⁸ The D.C. Circuit reiterated this

¹⁷⁶ AT&T Comments at 116.

¹⁷⁷ *Id.* at 117.

¹⁷⁸ *Iowa Utils. Bd.*, 525 U.S. at 390.

same point, rejecting an impairment test that turns on whether CLEC costs generally are greater than ILEC costs. “To rely on cost disparities that are universal as between new entrants and incumbents in *any* industry is to invoke a concept too broad, even in support of an *initial* mandate, to be reasonably linked to the purpose of the Act’s unbundling provisions.”¹⁷⁹

AT&T further asserts that ILECs have an advantage in the installation of new facilities because they can use their existing trenches, structures, conduits, and rights-of-way.¹⁸⁰ But ILECs also need to obtain rights-of-way to serve new developments. And even where an ILEC has an existing right-of-way, it generally must obtain permits from the local jurisdiction before installing additional infrastructure or reinforcing existing facilities. Moreover, to the extent ILECs already have rights-of-way that can be used for new investment, those rights-of-way must be made available to competitors. Finally, rights-of-way issues are not under the control of the ILECs. Municipal governments, for the most part, control rights-of-way. Accordingly, if there are problems with obtaining rights-of-way, regulators and/or lawmakers should deal with the municipal authorities. ILECs cannot be held accountable for something outside of their control. Like below-cost local rates, any rights-of-way issues are the result of *regulatory* actions, not impairment.

In any event, however, the question is not a simple comparison of whether ILECs have it easier than CLECs. The Supreme Court explained the flaw with this reasoning with the following analogy: it noted that one is not “impaired” in his ability to replace a light bulb by virtue of the fact that he has a ladder that requires him to stretch his arm to its full extension but lacks access to a ladder that is one-half inch taller.¹⁸¹ Similarly, the Court noted, a carrier is not

¹⁷⁹ *USTA*, 290 F.3d at 427.

¹⁸⁰ AT&T Comments at 118.

¹⁸¹ *Iowa Utils. Bd.*, 525 U.S. at 390 n.11.

impaired “when the business receives a handsome profit but is denied an even handsomer one.”¹⁸² This reasoning applies here as well. Simply because an ILEC may (sometimes) have an easier time than a CLEC obtaining a right-of-way does not mean that the CLEC is thereby “impaired” in a competitive sense. Once again, the CLECs forget that the Act is about promoting competition, not convenience.

B. The Commission Should Not Order Unbundling in Competitive Markets.

As SBC explained in its opening comments, a service-specific inquiry is critical to ensure that unbundling is permitted only where it will promote competition and its benefits outweigh its costs. Thus, unbundling should be allowed to facilitate the development of competition for services – such as local telephone exchange service – where competition may not yet be fully mature. But unbundling should not be permitted in already competitive markets.

The D.C. Circuit has now made clear that the failure to embrace this basic principle is reversible error. In the *Line Sharing Order*,¹⁸³ the Commission ordered unbundling of the high frequency portion of the loop, even though its “own findings . . . repeatedly confirm[ed] both the robust competition, and the dominance of cable, in the broadband market.”¹⁸⁴ The Commission’s approach, the D.C. Circuit explained, was “quite unreasonable.”¹⁸⁵ “[M]andatory unbundling comes at a cost,” and cannot be justified absent a compelling “reason to think [it] w[ill] bring on a significant enhancement of competition.”¹⁸⁶

¹⁸² *Id.*

¹⁸³ Third Report and Order in CC Docket No. 98-147 and Fourth report and Order in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 20912 (1999) (“*Line Sharing Order*”), vacated and remanded, *United States Telecom Ass’n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002).

¹⁸⁴ *USTA*, 290 F.3d at 428.

¹⁸⁵ *Id.* at 429.

¹⁸⁶ *Id.*; see also *id.* at 422 (a failure to consider the “state of competitive impairment in any particular market” could result in UNEs being available “in many markets where there is no reasonable basis for thinking that competition is suffering from any impairment of a sort that might have [been] the object of Congress’s concern”).

1. Sound Policy Dictates the Wisdom of the D.C. Circuit’s Judgment That Unbundling May Not Be Permitted in Competitive Markets.

The D.C. Circuit’s decision is correct, not only as a matter of law, but also as a matter of public policy. It should go without saying that unbundled elements should not be made available for use in already competitive markets. Injecting forced sharing and regulatory oversight into a functioning, competitive market will serve only to distort that operation. It will dampen the incentives of all carriers to invest in new and better technologies. It will drive out facilities-based carriers, not because they are not efficient or well-run, but simply because they will be unable to compete with artificial TELRIC rates. And these high costs will come with no benefit, for these markets have already reached the competitive state that is the goal of UNEs in the first place.

The CLECs that oppose a service-specific inquiry have little to say in defense of their position. On policy grounds, the CLECs attempt to argue that, once the Commission finds impairment with respect to a specific network element, “that impairment necessarily exists for every service that relies on the use of that element.”¹⁸⁷ But that is plainly not the case, as the examples of broadband, interexchange, and wireless services demonstrate. These are all competitive marketplaces that would be corrupted, rather than benefited, by UNEs.

Broadband. The Commission now has before it a mountain of evidence – from the Title II broadband proceeding, the Title I proceeding, and from the initial round of comments in this proceeding – that the market for broadband services is highly competitive.¹⁸⁸ In each segment of the market for broadband services, UNEs would serve no beneficial function, because all segments of the market are *already* competitive. In fact, in each segment, ILECs find themselves

¹⁸⁷ See, e.g., AT&T Comments at 112; WorldCom Comments at 59.

¹⁸⁸ See, e.g., Comments of SBC Communications Inc., CC Docket No. 02-33, *et al.* (FCC filed May 3, 2002); Comments of SBC Communications Inc., CC Docket No. 01-337 (FCC filed Mar. 1, 2002); Comments of Verizon, CC Docket No. 01-337 (FCC filed Mar. 1, 2002).

far behind the market leaders. In the mass market, cable has more than a two-to-one advantage over DSL. Cable broadband users number 7.5 million, compared with only 3.3 million for DSL.¹⁸⁹ Moreover, satellite-based and wireless-based broadband access is increasingly competitive. In the large-business market, the big three IXC's control more than two-thirds of all revenues for ATM and Frame Relay services.¹⁹⁰ Thus, in both instances, the dominant market players have clearly demonstrated that they are not impaired without unbundled access to the ILEC network. Tainting this market with UNEs would serve only to create, as Commissioner Martin has observed, "significant disincentives for the deployment of new facilities."¹⁹¹

Interexchange Service. A service-specific inquiry also reveals that UNEs are unnecessary for long distance service. The long distance market, like broadband, is already competitive and has been for years.¹⁹² This marketplace evidence conclusively establishes that UNEs were not and are not needed to promote competition in this marketplace. In an attempt to divert the Commission's attention from the competition in long distance, WorldCom tries to blur the line between local and long distance service. WorldCom argues that UNEs are important for long distance service because their availability enables the IXC's to compete against BOCs that receive 271 approval and offer packages of local and long distance offerings.¹⁹³ But that is simply another way of saying that some carriers might need access to UNEs to provide *local* service, not long distance service. It says nothing about whether carriers need UNEs for long distance service. Moreover, as the Commission has already concluded in its *Supplemental Order*

¹⁸⁹ *Fact Report* at IV-18.

¹⁹⁰ *Id.* at I-13. We discuss below the erroneous suggestion that there exists a separate "small business" market that lacks competitive alternatives. *See infra* pp. 89-92.

¹⁹¹ Kevin J. Martin, Commissioner, FCC, *Framework for Broadband Deployment*, Remarks at the National Summit on Broadband Deployment, Washington, DC (Oct. 26, 2001).

¹⁹² *E.g.*, Order, *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd 3271, 3288, ¶ 26 (1995).

¹⁹³ WorldCom Comments at 72-73.

Clarification, permitting long distance carriers to substitute TELRIC-priced UNEs for special access circuits would *undermine* competition in the local exchange, because it would “undercut the market position of many facilities-based competitive access providers.”¹⁹⁴ In any case, IXC’s can partner with other CLECs or resell ILEC services, and thus do not need access to UNEs, to offer packages of local and long distance services.

Wireless Service. “Wireless,” in the words of Chairman Powell, “is an extraordinary success story.”¹⁹⁵ Commissioner Abernathy has also cited the growth of the wireless sector as “perhaps the best example” of how allowing market forces to replace “a heavy regulatory hand” provides beneficial results for consumers.¹⁹⁶ Competition in the wireless market is thriving – a development that occurred wholly in the absence of UNEs. UNEs would therefore bring no benefits to this marketplace, and the Commission must reject the requests by various wireless carriers for access to unbundling.¹⁹⁷ Because wireless has successfully blossomed into a competitive market without UNEs, *a fortiori* carriers are not impaired in their ability to provide this service without UNEs.¹⁹⁸

2. The Commission Itself Has Previously Concluded That It May Decline To Order Unbundling in Non-Competitive Markets.

Because they have no defense on policy grounds, several CLECs resort to claiming that the Commission lacks legal authority to distinguish among markets when it orders unbundling.

¹⁹⁴ Supplemental Order Clarification, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 9587, 9597, ¶ 18 (2000) (“*Supplemental Order Clarification*”).

¹⁹⁵ Powell: *Wireless Industry’s Growth To Prompt More Regulatory Scrutiny*, Telecomms. Reports (Mar. 19, 2002).

¹⁹⁶ Abernathy, *My View from the Doorstep of FCC Change*, 54 Fed. Comm. L.J. at 205.

¹⁹⁷ See, e.g., Sprint Comments at 47; AT&T Wireless Comments at 4-7; CTIA Comments at 3-9; Dobson Comments 8-9; Nextel Comments at 5-9; Progress Telecom Comments at 8-11; VoiceStream Wireless Comments at 8.

¹⁹⁸ Moreover, the “UNE” wireless carriers request – what they call unbundled transport between their cell sites (or base stations) and their mobile switching section – does not meet the definition of transport because the base station is neither a wire center nor a switch. See *Fact Report* at V-21.

These CLECs argue that the impairment inquiry must be made on a “network element-by-network element” basis and that network elements must be made available for all purposes and services or for none at all.¹⁹⁹ The short answer to these contentions is that the D.C. Circuit has squarely rejected them, and held that the Commission – far from being *required* to order unbundling for all purposes – is in fact precluded from doing so where the market in question is competitive.²⁰⁰

Moreover, the Commission itself even before that decision had concluded that section 251(d)(2) requires it to consider the “services” a CLEC seeks to offer in conducting the impair analysis, and that the “at a minimum” language provides further support for a service-specific analysis. In its *Supplemental Order Clarification*, the Commission concluded that section 251(d)(2) – both in the language directing the Commission to consider whether the absence of a network element would “impair” a requesting carrier from providing “*the services it seeks to offer*” and in permitting the Commission to consider other factors consistent with the purposes of the 1996 Act – gives it ample authority to engage in a market-by-market granular analysis.²⁰¹ The Commission construed section 251(d)(2) “to mean that we may consider the markets in which a competitor ‘seeks to offer’ services and, at an appropriate level of generality, ground the unbundling obligation on the competitor’s entry into those markets in which denial of the requested elements would in fact impair the competitor’s ability to offer services.”²⁰² The Commission has also correctly observed that “the Supreme Court has directed the Commission, in exercising its authority under section 251(d)(2), to ‘tak[e] into account the objectives of the

¹⁹⁹ See, e.g., AT&T Comments at 110-12; WorldCom Comments at 53-55; CompTel Comments at 23-27.

²⁰⁰ See *supra* pp. 8-10.

²⁰¹ *Supplemental Order Clarification*, 15 FCC Rcd at 9595, ¶ 15.

²⁰² *Id.*

Act,’ along with its consideration of the ‘necessary’ and ‘impair’ standards.”²⁰³ As the Commission recently reiterated, this language allows it “to reject an all-or-nothing approach that would make network elements available for the provision of all telecommunications services if they are available for the provision of any such services.”²⁰⁴

Moreover, the Commission has properly rejected each and every statutory argument against this approach that the commenters rehash in their comments. Some commenters, like AT&T, rely on section 251(c)(3), claiming that it “unambiguously mandates that the network element must be available to competitive carriers for use in the provision of *any* telecommunications service that uses the element as an input.”²⁰⁵ The plain language of section 251(c)(3) belies this claim, and the D.C. Circuit has squarely rejected it.²⁰⁶ Section 251(c)(3) does not state that UNEs must be available for the provision of “any” or “every” telecommunications service. Rather, it simply states that ILECs must provide access to UNEs for the provision of “a” telecommunications service. It does not suggest in any way that the Commission is powerless to restrict UNEs from being used to provide a particular telecommunications service when carriers are not impaired in providing that service without access to UNEs, or when using UNEs for a particular purpose would be contrary to the goals of the Act.

Recognizing the infirmity of their statutory-language argument, AT&T and other commenters use a Commission statement from the *Local Competition Order* to prop up their section 251(c)(3) claim. In particular, they quote the Commission’s prior conclusion that

²⁰³ Brief for Federal Communications Commission at 25, *Competitive Telecomms. Ass’n v. FCC*, No. 00-1272 (D.C. Cir. filed Feb. 19, 2002) (“FCC Special Access Br.”) (quoting *Iowa Utils. Bd.*, 525 U.S. at 391).

²⁰⁴ *Id.* at 18-19.

²⁰⁵ AT&T Comments at 111.

²⁰⁶ *USTA*, 290 F.3d at 429 (characterizing this reading as “quite unreasonable”).

“‘[s]ection 251(c)(3) does not impose any service-related restrictions or requirements on requesting carriers in connection with the use of unbundled elements.’”²⁰⁷ But, as the Commission itself has acknowledged, that conclusion “do[es] not survive the Supreme Court’s decision in [*Iowa Utilities Board*].”²⁰⁸ The Commission explained the ramifications of the Supreme Court’s decision in *Iowa Utilities Board* in its *Supplemental Order Clarification*: “Before the Supreme Court issued its decision . . . , we sometimes approached an incumbent’s obligation to unbundle network elements as though it were an all-or-nothing proposition, suggesting that, if a competitor were entitled to obtain access to an element for one purpose, it was generally also entitled to obtain access to that element for wholly different purposes as well.”²⁰⁹ That analysis, however, “was predicated upon a reading of section 251(c)(3) that the Supreme Court explicitly rejected, and it improperly failed to address the bearing that section 251(d)(2) could have on the permissible use of network elements.”²¹⁰ Thus, “section 251(c)(3) itself poses no ‘plain language’ bar” on a service-specific analysis.²¹¹ In other words, the suggestion that section 251(c)(3) mandates access to UNEs for all services is, according to the Court’s analysis, “undoubtedly wrong: Section 251(c)(3) indicates *where* unbundled access must occur, not *which* [network] elements must be unbundled.”²¹²

The Commission has likewise rejected – and properly so – the argument that the statutory definition of “network element” in section 153(29) somehow bars a service-specific analysis. This provision does not speak to *which* network elements must be made available, or for what

²⁰⁷ AT&T Comments at 111 (quoting First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15634, ¶ 264 (1996) (“*Local Competition Order*”) (subsequent history omitted)).

²⁰⁸ FCC Special Access Br. at 23.

²⁰⁹ *Supplemental Order Clarification*, 15 FCC Rcd at 9594, ¶ 12.

²¹⁰ FCC Special Access Br. at 23 (citing *Supplemental Order Clarification*, 15 FCC Rcd at 9594, ¶ 12).

²¹¹ *Id.*

²¹² *Iowa Utils. Bd.*, 525 U.S. at 391 (internal quotation marks omitted; alteration in original).

telecommunications services they must be provided. It is a purely definitional provision. A service-specific analysis, as the Commission has observed, merely tells entrants what they may do with UNEs in some circumstances; it does not alter what the requesting carriers are getting.²¹³

Thus, the Commission has the legal authority – and must exercise it – to prevent carriers from using UNEs in competitive markets.

C. The Commission Must Decline To Order Unbundling Where Facilities Are “Sensibly Duplicable.”

One thing that emerges loud and clear from the D.C. Circuit’s opinion is that the Commission may not make UNEs available where competitors are already using or should be able to use alternatives to UNEs. With respect to some elements, such as switching, transport, and high-capacity loops, that is true nationwide. With respect to other elements, it may be true in some areas but not yet in others. For those elements, the Commission *must* adopt a more granular analysis of when to order unbundling. The court flatly rejected the Commission’s prior rules of “[u]nvarying [s]cope” as inconsistent with the Act and its impairment inquiry.²¹⁴

Thus, the Commission must embrace a more granular analysis that shields competitive pockets from the disrupting effect of UNEs. Indeed, that is the purpose of the “impair” test: to identify those instances where carriers need access to UNEs in order to compete and where, as a result, the benefits of unbundling outweigh the costs. In all other cases, the harms of unbundling are too high.

In conducting this impairment analysis, the Commission must be guided by actual marketplace evidence, which is far more probative than theoretical concerns divorced from reality. If CLECs are providing service without using UNEs, they are *necessarily* not impaired in their ability to provide that service without access to UNEs. That is why, for example, the

²¹³ FCC Special Access Br. at 24.

²¹⁴ *USTA*, 290 F.3d at 422.

D.C. Circuit questioned the Commission’s decision to apply unbundling across-the-board for transport, even though it had evidence before it that 47 of the top 50 metropolitan statistical areas had three or more competitors.²¹⁵

The Commission must also account for the subsidized local rate structures that many states have left in place. As explained at the outset, for the many customers that receive service at below-cost rates, it is the level of the retail rate – rather than any lack of access to ILEC facilities – that creates any difficulty the CLEC may face in attempting to serve the customer without UNEs.²¹⁶ After the D.C. Circuit’s opinion, the Commission must take care to distinguish between true impairment and barriers to entry that have nothing to do with impairment.

Commenters offer almost no support for their objections to a more granular analysis. AT&T asserts that there is simply “no generic set of conditions today – capable of being reduced to a rule – that defines circumstances in which CLECs are efficiently providing local service to any class of customers using loops, transport, or switching obtained from non-ILEC sources.”²¹⁷ Essentially, then, it is AT&T’s position that unbundling must be permitted everywhere until it is unnecessary anywhere.

As the D.C. Circuit concluded, there is absolutely no justification for such a blatantly over-inclusive rule and the costs it brings. The court noted that the Commission previously identified a granular test for switching, belying AT&T’s sweeping claim that a generic set of conditions cannot be identified for loops, transport, or switching.²¹⁸ And although switching need not be unbundled under any circumstances given the competitive conditions in the market,

²¹⁵ *Id.*

²¹⁶ *See id.*

²¹⁷ AT&T Comments at 99.

²¹⁸ *See USTA*, 290 F.3d at 423.

SBC has identified granular tests for both loops and transport that define the circumstances in which CLECs do not need access to those elements to provide local exchange service.

This approach calibrates the unbundling regime to provide competitors with assistance where they need it and to protect competition from the distorting effect of UNEs where there is no impairment. And, again, as the D.C. Circuit already confirmed,²¹⁹ this type of granular analysis is eminently administrable.²²⁰ The Commission had no trouble with its more refined test for switching and EEL conversions, and it will similarly have no difficulty with the more tailored inquiry SBC suggests.

D. The Commission Must Conduct Periodic Reviews of Its Unbundling Requirements in Order To Delist Elements That Are Competitively Provided.

As the Commission recognized in the *UNE Remand Order*, “due to changes in the market and new technologies,” the list of unbundled elements must be reconsidered periodically.²²¹ This is a dynamic industry, and periodic reviews are vital to ensure that the Commission’s regulations correspond to competitive and technological developments.

Several CLECs, however, see the writing on the wall. They know that competition will continue to increase and therefore elements will continue to be removed from the unbundling list. Thus, in an effort to freeze in place as many UNEs as possible, they ask the Commission to

²¹⁹ *Id.*

²²⁰ See, e.g., Sprint Comments at 14 (asserting that a granular analysis would “impose an unrealistically heavy administrative burden on the Commission and the industry”); WorldCom Comments at 56 (asserting that use restrictions would be “nearly impossible to administer”).

²²¹ *UNE Remand Order*, 15 FCC Rcd at 3756, ¶ 130. Several CLECs agreed with the Commission’s assessment. See, e.g., Comments of KMC Telecom Inc. at 33, CC Docket Nos. 96-98 & 95-185 (FCC filed May 26, 1999) (“[T]he best way for the Commission to determine in light of changed market or technical conditions whether UNEs should be added to, or removed from, the national list, is through periodic reviews of the list based on a record gathered from industry comments.”); Comments of McLeodUSA at 3, CC Docket No. 96-98 (FCC filed May 26, 1999) (“As circumstances change, the Commission’s rules on unbundling can, and should, be revisited.”); Comments of MCI WorldCom, Inc. at 11, CC Docket Nos. 96-98 & 95-185 (FCC filed May 26, 1999) (“[T]he Commission itself should reexamine, after a fixed period of time, its decisions to require particular network elements to be unbundled nationwide.”).

avoid periodic reviews of the UNE regime on the ostensible rationale that such reviews are burdensome and undermine regulatory stability.²²²

Not reviewing the UNE regime, however, is far more burdensome and unsettling. If UNEs remain in place long after they are needed, their distorting effects cripple the development of facilities-based competition.

Congress recognized the dangers of imbedded regulation in this industry. It therefore made clear that the Commission *must* conduct periodic reviews – and must do so every two years. Section 11 of the Communications Act requires the Commission to review every two years its “regulations that apply to the operations or activities of any provider of telecommunications service” and to “determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of” telecommunications service. 47 U.S.C. § 161. The Commission has read this provision “to require a review of our regulations with an eye toward achieving Congress’s goal, in the 1996 Act, of a truly ‘pro-competitive, deregulatory’ national policy framework for the telecommunications industry.”²²³

Perhaps more than any other type of regulation, UNE regulations require frequent periodic review. Once UNE regulations are no longer necessary, they threaten to stunt competitive development and investment. And they place a severe, “unnecessary burden on the carriers that are subject to” them.²²⁴

²²² See, e.g., AT&T Comments at 251-52; CompTel Comments at 87-88. Other CLECs, like WorldCom, ask for an inordinately long period between reviews. See WorldCom Comments at 6 (asking for a five-year review).

²²³ Report and Order in CC Docket Nos. 00-199, 97-212, and 80-286; Further Notice of Proposed Rulemaking in CC Docket Nos. 00-199, 99-301, and 80-286, *2000 Biennial Regulatory Review – Comprehensive Review of the Accounting Requirements and ARMIS Reporting Requirements for Incumbent Local Exchange Carriers: Phase 2*, 16 FCC Rcd 19911, 19913, ¶ 2 (2001) (citation omitted).

²²⁴ *Id.*

IV. THE COMMISSION MUST PREEMPT STATE ATTEMPTS TO IMPOSE ADDITIONAL UNBUNDLING OBLIGATIONS.

All of the Commission's efforts in this proceeding and its companion proceedings on Title I and Title II regulation for broadband will be for naught if the Commission fails to make clear that its determinations preempt the states. As the Commission has observed, the purpose of the multiple proceedings it has opened on various broadband questions is to "build the foundation for a comprehensive and consistent *national* broadband policy."²²⁵ The Commission has emphasized that "[i]nconsistent local regulation potentially can disrupt the Commission's national broadband policy and keep broadband technologies out of the hands of many Americans."²²⁶

As SBC discussed in its opening comments, a balkanized regulatory regime that forces ILECs to engage in state-by-state proceedings to defend their broadband investment and facilities from burdensome unbundling requirements creates enormous uncertainty that has a severe chilling effect on broadband investment. Commenters confirm SBC's worst fears and clearly indicate their intention to seek expanded unbundling requirements in each state if they are permitted to do so by the Commission. This result would be directly contrary, not only to section 251(d)(2), but also section 706 of the 1996 Act, which calls for federal and state regulators to encourage the deployment of broadband services through regulatory forbearance and other measures that "remove barriers to infrastructure investment."²²⁷

While the threat is especially severe in the broadband context, the same danger exists for all the Commission's unbundling policies. If the Commission determines that carriers are not

²²⁵ Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Computer III Further Remand Proceedings*, 17 FCC Rcd 3019, 3023, ¶ 8 (2002) ("*Wireline Broadband NPRM*") (emphasis added).

²²⁶ Cable Servs. Bureau, FCC, *Broadband Today*, Report No. CS 99-14, at 43-44 (Oct. 1999) ("FCC Staff Report"), at <http://www.fcc.gov/Bureaus/Cable/Reports/broadbandtoday.pdf>.

²²⁷ 47 U.S.C. § 157 note.

impaired without access to an incumbent's network or that unbundling would undercut the goals of the Act, allowing states to override that determination would plainly harm the development of competition and hinder investment in new technologies and facilities.

A. The States Have Repeatedly Shown That They Will Override the Commission's Unbundling Decisions if Given the Opportunity.

The states have made it crystal clear in their comments in this proceeding and through their actions in state proceedings that their vision of unbundling is far different than the Commission's, and that they believe "the more unbundling, the better." Indeed, the states have repeatedly ignored the Commission's unbundling limits. For example, although the Commission has concluded that the unbundling of packet switching would harm the development of advanced services competition, the Texas Public Utility Commission nevertheless recently concluded that CLECs must be permitted to obtain access to Project Pronto on an unbundled basis.²²⁸ The ICC reached a similar conclusion,²²⁹ as did the Wisconsin Public Service Commission.²³⁰ And, given the staff recommendation in Kansas,²³¹ it appears the Kansas Corporation Commission may follow suit with even more onerous unbundling requirements for Pronto.

Similarly, although the Commission concluded in the *UNE Remand Order* that there should be a carve-out for switching when carriers serve customers with four or more lines in density zone 1 in the top 50 Metropolitan Statistical Areas ("MSAs") where ILECs provide

²²⁸ Revised Arbitration Award, *Petition of Rhythms Links, Inc. Against Southwestern Bell Telephone Company for Post-Interconnection Dispute Resolution and Arbitration Under the Telecommunications Act of 1996 Regarding Rates, Terms, Conditions and Related Arrangements for Line Sharing*, PUC Docket No. 22469 (Tex. Pub. Util. Comm'n Sept. 21, 2001).

²²⁹ *Illinois HFPL Order* at 22-25.

²³⁰ Final Decision, *Investigation Into Ameritech Wisconsin's Unbundled Network Elements*, Docket No. 6720-TI-161, at 116 (Wis. Pub. Serv. Comm'n Mar. 22, 2002).

²³¹ Brief of Commission Staff, *General Investigation to Determine Conditions, Terms, Rates for Digital Subscriber Line Unbundled Network Elements, Loop Conditioning and Line Sharing*, Docket No. 01-GIMT-032-GIT (Kan. Corp. Comm'n filed Mar. 23, 2001).

access to the EEL²³² – because requesting carriers “are not impaired” in that situation – state commissions have ignored this determination. The Louisiana Public Service Commission “mandated that [ILEC] switching be made available to competing carriers on an unrestricted basis at TELRIC rates throughout the state.”²³³ The New York State Department of Public Service has concluded that switching must be unbundled unless a carrier is serving a customer with 18 lines or more.²³⁴ The Texas PUC also recently concluded that SBC must provide unbundled switching without exception.²³⁵

The states’ comments in this proceeding show that they have no intention of changing course. The National Association of Regulatory Utility Commissioners (“NARUC”) argues that the Commission “should not constrain State authority to determine if ‘UNE-P’ should be made available in particular markets” because many state Commissions “have embraced the UNE-P as a means to expand customer choice for mass market, residential and small business customers.”²³⁶ In other words, regardless of whether each of the elements of the UNE-P satisfy the impair test and (and they do not), the state commissions want authority to retain the UNE-P based on their idiosyncratic vision of what is best for consumers. States want “complete autonomy to establish additional requirements”²³⁷ and the “ability to re-list a network element that has been de-listed by the Commission.”²³⁸ The ICC “firmly opposes *any* action which

²³² *UNE Remand Order*, 15 FCC Rcd at 3823, ¶ 278.

²³³ Letter from Jack A. “Jay” Blossman, Jr., Chairman, Louisiana Public Service Commission, to William F. Caton, Acting Secretary, FCC, CC Docket No. 01-338, at 1 (FCC filed Apr. 5, 2002).

²³⁴ New York State Department of Public Service Comments at 8.

²³⁵ Arbitration Award, *Petition of MCIMetro Access Transmission Services, LLC, et al. for Arbitration with Southwestern Bell Telephone Company Under the Telecommunications Act of 1996*, PUC Docket No. 24542, at 68-75, 165-66 (Tex. Pub. Serv. Comm’n Apr. 29, 2002). The Texas PUC also mandated unbundled access to OS/DA.

²³⁶ NARUC Comments at 9 (internal quotation marks omitted).

²³⁷ Oklahoma Corporation Commission Comments at 5.

²³⁸ Pennsylvania Public Utility Commission Comments at 5; *see also* Florida Public Service Commission Comments at 6 (“The FPSC contends that state commissions should be allowed to add additional [UNEs] to the list (including those removed from the FCC’s national list), if warranted by the specific market conditions within a

would weaken currently existing unbundling requirements as premature.”²³⁹ The Missouri Public Service Commission urges the Commission to *increase* unbundling requirements “to include such things as technologies to promote advanced services such as SBC’s Project Pronto architecture and line splitting provisions.”²⁴⁰ And the Indiana Utility Regulatory Commission is openly hostile to facilities-based competition, arguing that “[e]liminating or limiting the availability of certain UNEs and combinations could force CLECs to duplicate many ILEC facilities, plant, or equipment.”²⁴¹

The CLECs believe they have a sympathetic ear in many states for their “more UNEs, the better” argument. Thus, for example, on the same day AT&T and WorldCom filed comments in this proceeding, they submitted testimony in Georgia asking the state PSC to unbundle switching, without any exceptions, and to unbundle operator services and directory assistance.²⁴² They argued that the FCC’s rulings “should not discourage the [Georgia Public Service] Commission from applying its own judgment as to what should be offered in this State.”²⁴³ These carriers therefore collaterally attacked this Commission’s determinations in the *UNE Remand Order* that carriers are not impaired without access to OS/DA and that a switching carve-out was in the interest of competition because carriers were not impaired in the circumstance identified by the Commission. They argued to the Georgia PSC that it was free to

state.”); Indiana Utility Regulatory Commission Comments at 3 (the FCC should “continu[e] to allow the state commissions to create and implement additional unbundling requirements that exceed those established by the FCC”); Kansas Corporation Commission Comments at 4 (“The KCC urges the FCC not to restrict the ability of state commissions to designate additional UNEs based upon the competitive environment present in the local market.”).

²³⁹ Illinois Commerce Commission Comments at 3.

²⁴⁰ Missouri Public Service Commission Comments at 9.

²⁴¹ Indiana Utility Regulatory Commission Comments at 4.

²⁴² See Rebuttal Testimony of Joseph Gillan, *Generic Proceeding to Review Cost Studies, Methodologies, Pricing Policies and Cost Based Rates for Interconnection and Unbundling of BellSouth Telecommunications, Inc.’s Network*, Docket No. 14361-U, at 3-4 (Ga. Pub. Serv. Comm’n filed Apr. 5, 2002) (“Gillan Rebuttal Testimony”).

²⁴³ *Id.* Exh. JPG-2, at 6.

order unbundling in these situations even though the FCC found no impairment.²⁴⁴ And, in a desperate last-ditch attempt to avoid the D.C. Circuit’s mandate, ALTS and CompTel have urged the Commission to abdicate its authority under the Act and allow the states to conduct the granular analysis that the Act requires.²⁴⁵

B. States May Not Enforce Any Legal Requirement That Alters the Balance Achieved by the FCC When Determining What Network Elements Should and Should Not Be Unbundled.

Notwithstanding the states’ protestations to the contrary, the 1996 Act expressly assigns to the FCC the task of “determining what network elements should be made available for purposes of” satisfying the requirement that an ILEC provide to CLECs nondiscriminatory access to network elements on an unbundled basis.²⁴⁶ Although the FCC’s implementation of this requirement may not preclude the enforcement of any state regulation or policy that “is consistent with the requirements of” section 251, and “does not substantially prevent implementation” of the purposes and requirements of the Act,²⁴⁷ the FCC’s determination of which network elements go on (and which elements stay off) the list of elements to be unbundled is a question of federal policy to which states must adhere.

In upholding the FCC’s jurisdictional authority to make rules governing matters to which the 1996 Act applies, the Supreme Court made clear that

the question . . . is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has. The question is whether the state commissions’ participation in the administration of the new *federal* regime is to be guided by federal-agency regulations. If there is any

²⁴⁴ Gillan Rebuttal Testimony at 6-8.

²⁴⁵ See Competition Working Group June 2002, at 2 (attached to Letter from John Windhausen, Jr., President, ALTS, and H. Russell Frisby, Jr., President, CompTel, to Michael K. Powell, Chairman, FCC, CC Docket Nos. 96-98 & 98-147 (FCC filed June 5, 2002)).

²⁴⁶ 47 U.S.C. § 251(d)(2).

²⁴⁷ *Id.* § 251(d)(3).

“presumption” applicable to this question, it should arise from the fact that a federal program administered by 50 independent state agencies is surpassing strange.²⁴⁸

The Court also made clear that “if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel.”²⁴⁹

In his concurring opinion in *Iowa Utilities Board*, Justice Breyer wrote that “the statute’s unbundling requirements, read in light of the Act’s basic purposes, require balance. Regulatory rules that go too far, expanding the definition of what must be shared beyond that which is essential to that which merely proves advantageous to a single competitor, risks costs that, in terms of the Act’s objectives, may make the game not worth the candle.”²⁵⁰ As the Court recognized, section 251(d)(2) “requires the FCC to apply *some* limiting standard, rationally related to the goals of the Act,” when deciding what elements to put on the list.²⁵¹ And ordering blanket access to all network elements is inconsistent with the requirement that the FCC consider whether the failure to provide access to a particular network element would “impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.”²⁵² As the Court recognized, “[w]e cannot avoid the conclusion that, if Congress had wanted to give blanket access to incumbents’ networks on a basis as unrestricted as the scheme the Commission has come up with, it would not have included § 251(d)(2) in the statute at all. It would simply have said (as the Commission in effect has) that whatever requested element can be provided must be provided.”²⁵³

²⁴⁸ *Iowa Utils. Bd.*, 525 U.S. at 378 n.6.

²⁴⁹ *Id.* See also *GTE North, Inc. v. Strand*, 209 F.3d 909, 923 (6th Cir.) (state commissions “play such a critical role in administering the [federal Act’s] regulatory framework that *they must operate strictly within the confines of the statute*”) (emphasis added), *cert. denied*, 531 U.S. 957 (2000).

²⁵⁰ *Iowa Utils. Bd.*, 525 U.S. at 429-30 (Breyer, J., concurring in part and dissenting in part).

²⁵¹ *Id.* at 388.

²⁵² 47 U.S.C. § 251(d)(2)(B).

²⁵³ *Iowa Utils. Bd.*, 525 U.S. at 390.

The D.C. Circuit made the same point about the costs of too much unbundling and the need to balance those costs against any prospective benefits:

Each unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities. At the same time – the plus that the Commission focuses on single-mindedly – a broad mandate can facilitate competition by eliminating the need for separate construction of facilities where such construction would be wasteful. Justice Breyer concluded that fulfillment of the Act’s purposes therefore called for “balance” between these competing concerns. A cost disparity approach that links “impairment” to universal characteristics, rather than ones linked (in some degree) to natural monopoly, can hardly be said to strike such a balance. The Local Competition Order reflects little Commission effort to pin “impairment” to cost differentials based on characteristics that would make genuinely competitive provision of an element’s function wasteful.²⁵⁴

The D.C. Circuit struck down the prior UNE rules because the Commission had applied the statutory standard of impairment as if it meant only that unbundling was required any time the requesting carrier faced costs that were higher than the incumbent’s. The court rejected the Commission’s attempt to define the list of network elements to be unbundled because the Commission failed to strike an appropriate balance between avoiding wasteful duplication of facilities, on one hand, and imposing costs in the form of disincentives to innovate and of managing the shared use of common facilities, on the other hand. As the Court noted, the FCC’s

entire argument about expanding competition and investment boils down to the Commission’s expression of its belief that in this area more unbundling is better. But Congress did not authorize so open-ended a judgment. It made “impairment” the touchstone. . . . [T]o the extent that the Commission orders access to UNEs in circumstances where there is little or no reason to think that its absence will genuinely impair competition that might otherwise occur, we believe it must point to something a bit more concrete than its belief in the beneficence of the widest unbundling possible.²⁵⁵

²⁵⁴ *USTA*, 290 F.3d at 427 (citations omitted).

²⁵⁵ *Id.* at 425.

The balance that the FCC must strike on remand will reflect a policy judgment about the appropriate amount of unbundling. That judgment will, of necessity, reflect a determination as to the costs and benefits of unbundling, and, under the Supremacy Clause, states may not frustrate or disregard this federal policy. Where the Commission has determined that an element should not be unbundled – that the cost of doing so is greater than the benefits – the states can not countermand that determination. As the Supreme Court has recognized, where Congress or a federal agency has made a specific “policy judgment” as to how “the law’s congressionally mandated objectives” would “best be promoted,” states are not at liberty to deviate from those “deliberately imposed” federal prerogatives.²⁵⁶ In other words, where federal law sets forth a legal and regulatory framework for accomplishing a lawful objective through the balancing of competing interests, the states may neither alter that framework nor depart from the federal judgment regarding the proper balance of competing regulatory concerns.²⁵⁷

A federal agency’s decision *not* to regulate can have as much preemptive force as one that affirmatively chooses to regulate. So, for example, where a decision not to require the unbundling of a particular element – or to require unbundling only under certain conditions – “takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute,” that decision preempts any inconsistent state regulation or requirement.²⁵⁸ In light of what the *USTA* court has now said about the need to take into account the costs of unbundling when determining which elements belong on the list and which do not, any decision *not* to include an element on the list (or, indeed, to require the satisfaction of certain

²⁵⁶ *Geier v. American Honda Motor Co.*, 529 U.S. 861, 872, 881 (2000).

²⁵⁷ See, e.g., *Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 155 (1982) (a federal regulation that “consciously has chosen not to mandate” particular action preempts state law that would deprive an industry “of the ‘flexibility’ given it by [federal law]”).

²⁵⁸ *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 774 (1947); accord *United States v. Locke*, 529 U.S. 89, 110 (2000); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978); cf. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 286 (1995).

conditions before placing an element on the list) is an integral part of the federal policy purporting to balance these competing interests. And that policy will preempt any state law or legal requirement purporting to strike a different balance.

This need to strike a balance among competing policy objectives is hardly unique to the area of federal telecommunications regulation. The Supreme Court recently preempted a state legal requirement that conflicted with the Department of Transportation’s federal safety guidelines because the state requirement upset the careful federal balance that the Department’s regulation had achieved.²⁵⁹ The Department had sought in its federal motor vehicle safety standard to strike a balance between safety, on one hand, and other objectives such as lowering costs, overcoming technical safety problems, encouraging technological development, and winning widespread consumer acceptance, on the other hand.²⁶⁰ The petitioners in *Geier* had claimed that a state legal requirement mandating the use of airbags over all other passive restraints was consistent with the federal safety standards. But, just as the *USTA* court rejected the view that the federal Communications Act permitted the agency simply to conclude that “more unbundling is better,”²⁶¹ the Supreme Court rejected the petitioners’ position that the federal policy was “the more airbags, and the sooner, the better.”²⁶² Because the state legal requirement “required [automobile] manufacturers . . . to install airbags rather than other passive restraint systems, such as automatic belts or passive interiors,” it “stood as an obstacle to the gradual passive restraint phase-in that the federal regulation deliberately imposed.”²⁶³ Because the state law “would have stood ‘as an obstacle to the accomplishment and execution of’ the

²⁵⁹ *Geier*, 529 U.S. at 874-86.

²⁶⁰ *Id.* at 875.

²⁶¹ *USTA*, 290 F.3d at 425.

²⁶² *Geier*, 529 U.S. at 874.

²⁶³ *Id.* at 881.

important means-related federal objectives” that were central to the federal policy, the Supreme Court preempted the state law.²⁶⁴

In *Locke*, the Supreme Court considered the argument that a state regulation could not be preempted because it was “similar to federal requirements.”²⁶⁵ But “[t]his is an incorrect statement of the law. It is not always a sufficient answer to a claim of pre-emption to say that state rules supplement, or even mirror, federal requirements.”²⁶⁶ Instead,

[t]he appropriate inquiry still remains whether the purposes and objectives of the federal statutes, including the intent to establish a workable, uniform system, are consistent with concurrent state regulation. On this point, Justice Holmes’ later observation is relevant: “When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go.” *Charleston & Western Carolina R. Co. v. Varnville Furniture Co.*, 237 U.S. 597, 604 (1915).²⁶⁷

C. States Are Not Authorized by Rule or by Statute To Alter the Balance Reflected in the FCC’s List of Unbundled Network Elements.

State commissions have no residual state-law authority to establish unbundling obligations not authorized by the FCC. Any state statute or regulation purporting to grant such authority is contrary to federal law and hence preempted.

The Supreme Court and D.C. Circuit have made clear that the Act establishes clear limits on ILEC unbundling obligations – limits that, properly applied, strike an appropriate balance between avoiding wasteful duplication of facilities, on the one hand, and “spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities,”

²⁶⁴ *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), and citing *de la Cuesta*, 458 U.S. at 156). In *de la Cuesta*, the Supreme Court preempted a state law that limited the availability of an option that the federal agency considered essential to ensure its ultimate objectives. *See* 458 U.S. at 156.

²⁶⁵ 529 U.S. at 115.

²⁶⁶ *Id.*

²⁶⁷ *Id.* (parallel citations omitted).

on the other hand.²⁶⁸ It is difficult to conceive how a state commission's adding to the list of unbundled network elements could ever be consistent with the federal balance that the *USTA* decision now requires. To be sure, when the "national policy framework" meant nothing other than "more unbundling is better,"²⁶⁹ a state commission's decision to add to the list of unbundled network elements was, by definition, consistent with the federal policy.²⁷⁰ But that simply cannot be true once the new federal policy is established pursuant to the *USTA* decision. It follows that, if the FCC has considered and rejected a proposal to include a particular network element on the list – or, if the FCC has required that certain conditions be satisfied before the network element must be unbundled – any state commission effort to modify that determination is preempted.

The so-called savings clauses in sections 251(d)(3) and 261(c) do not authorize state commissions to establish independent state impairment standards pursuant to which state commissions could order additional unbundling. The Supreme Court has consistently warned against "plac[ing] more weight on the savings clauses than those provisions can bear, either from a textual standpoint or from a consideration of the whole federal regulatory scheme."²⁷¹ In *Geier*, the Supreme Court made clear that a savings clause "does *not* bar the ordinary working of conflict pre-emption principles," and therefore courts must "'decline[] to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.'"²⁷²

²⁶⁸ *Iowa Utils. Bd.*, 525 U.S. at 427.

²⁶⁹ *Id.* at 425.

²⁷⁰ The FCC originally prohibited state commissions from subtracting from the list, because that is not consistent with the "more unbundling is better" policy. See *UNE Remand Order*, 15 FCC Rcd at 3769, ¶ 158 ("state-by-state removal of network elements from the national list . . . would lead to greater uncertainty in the market and would hinder the development of competition").

²⁷¹ *Locke*, 529 U.S. at 105.

²⁷² *Geier*, 529 U.S. at 869, 870 (quoting *Locke*, 529 U.S. at 106).

If the Commission intends its ruling in this proceeding to have any effect, it must make clear that its determinations *not* to unbundle are as binding on the states as its decisions that unbundling is required. In the absence of such a holding, the Commission will have failed to honor the Supreme Court’s mandate that it establish *limits* on unbundling. Indeed, even if the states do not ultimately disagree with the Commission, the uncertainty whether they will itself creates an intolerable risk. As Chairman Powell has noted, “[t]here is no greater threat to an entrepreneur, or any business, than uncertainty. A key government decision that hangs in suspended animation will kill the best-laid business plan.”²⁷³ “To attract capital to build infrastructure and deploy services,” Chairman Powell has noted, “the risks of government intrusion must be limited. More importantly, there must be a perception of a fair, unbiased and stable regulatory forum.”²⁷⁴ Commissioner Martin has similarly observed that, “to welcome and foster innovation, the Commission must provide a stable regulatory environment. Regulatory uncertainty functions as an entry barrier, limiting investment and impeding deployment of new services.”²⁷⁵ Commissioners Abernathy and Copps have likewise emphasized the need for “clear, predictable rules, so that business is not asked to operate with a question mark.”²⁷⁶ Thus, “more and more,” the Commission must “be guided by the important value of limiting that uncertainty”²⁷⁷ and creating “regulatory stability.”²⁷⁸

²⁷³ Michael K. Powell, Chairman, FCC, Remarks at the Association for Local Telecommunications Services, Crystal City, Virginia (Nov. 30, 2001).

²⁷⁴ Michael K. Powell, Chairman, FCC, Remarks at the Tenth African Telecommunications and Information Technology Conference (AFCOM 2001), Arlington, Virginia (July 18, 2001).

²⁷⁵ Kevin J. Martin, Commissioner, FCC, Remarks at the Telecommunications Law Conference and the Texas Chapter of the Federal Communications Bar Association, Richardson, Texas (Mar. 7, 2002).

²⁷⁶ Michael J. Copps, Commissioner, FCC, Remarks at the National Summit on Broadband Deployment, Washington, DC (Oct. 26, 2001); Kathleen Q. Abernathy, Commissioner, FCC, Remarks at the Wireless Communications Association’s 14th Annual Convention, Boston, Massachusetts (June 25, 2001).

²⁷⁷ Michael K. Powell, Chairman, FCC, Remarks at SuperComm 2001, Atlanta, Georgia (June 6, 2001).

²⁷⁸ Notice of Inquiry, *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 15 FCC Rcd 19287, 19287-88, ¶ 2 (2000).

The Commission would fail to achieve that goal if it ignores the devastating effect state commission unbundling proceedings have on investment. SBC, for example, has significantly curtailed its investment in Project Pronto precisely because of the uncertainty of state regulatory decisions. Verizon, too, has told the Commission that “[t]he resulting uncertainty” that it may have to unbundle line cards in remote terminals “is one of the key reasons that Verizon to this point has significantly constrained the deployment of DSL capability in [its] remote terminals.”²⁷⁹ Although this Commission made clear that unbundling packet switching would be competitively harmful – because it would “stifle burgeoning competition in the advanced service market”²⁸⁰ – several state commissions have ignored that ruling and reached a contrary conclusion, thereby deterring SBC from proceeding as planned with its network investment. Thus, what the Commission feared would happen if unbundling of packet switching were required – that incentives to invest would be dampened – materialized. To prevent similarly harmful results, the Commission must use this proceeding to clarify its jurisdiction over unbundling rules and to cabin the states from overruling those determinations. This is necessary to produce the regulatory certainty and coherent framework that is necessary for unbundling to succeed in promoting competition without stifling investment.²⁸¹

²⁷⁹ Letter from Thomas Tauke, Verizon, to Michael K. Powell, Chairman, FCC, at 4 (FCC filed Nov. 4, 2001).

²⁸⁰ *UNE Remand Order*, 15 FCC Rcd at 3840, ¶ 316.

²⁸¹ Sprint Comments at 57-58 (noting that the Commission cannot delegate its rulemaking authority to the states because the industry needs regulatory certainty).

PART TWO: APPLICATION OF THE FRAMEWORK

I. BROADBAND UNEs

The broadband issues raised in this proceeding present the Commission with a stark choice. On one side, AT&T, the nation's largest cable modem provider, and its supporters ask the Commission to impose crippling asymmetric regulations exclusively on the broadband facilities of incumbent LECs – companies that need to invest billions of dollars to catch up with the dominant cable modem providers in the highly competitive and rapidly expanding broadband market. In their view, the correct approach to the enormous risk and investment of private capital that incumbent LECs must undertake to close the gap is for the Commission to require incumbents to turn over their new facilities lock, stock, and barrel to their competitors, which can then provide service without having to bear any remotely equivalent investment risks.

On the other side, incumbent LECs ask only that the Commission live up to its words. The Commission has spoken repeatedly of its desire to put in place a “minimal regulatory environment” for broadband based on a “functional approach” that strives to be “consistent . . . across platforms” and avoids “embed[ding] particular technologies.”²⁸² SBC's opening comments explained that it provides broadband services over a distinct, packet-based network that runs alongside of, and interfaces with, the legacy telephone network. That distinct network provides broadband information services, as well as high-capacity transmission services, in robust competition with the cable incumbents (in the residential market) and with the IXC's (in the business market). A critical step – perhaps *the* critical step – in the formulation of a national broadband policy is the recognition that this distinct network, including not just packet switches but also all of the integrated fiber facilities and attached electronics that support packetized transmission, are off-limits for unbundling. Such regulatory certainty is absolutely indispensable to ILEC's' ability to justify the massive investment necessary to deploy packet-based services on

²⁸² *Wireline Broadband NPRM*, 17 FCC Rcd at 3022-23, ¶¶ 4-7.

a widespread basis. And that deployment, in turn, is critical to the nation's economic recovery.

As Chairman Powell has said, "[t]he time now is for action."²⁸³

That action must happen soon, and it must be decisive. The cable incumbents that currently dominate the broadband landscape provide service today through a robust broadband network that can deliver video, data, and voice simultaneously. As cable incumbents themselves loudly proclaim, DSL is no match for this "three-trick pony."²⁸⁴ It is, rather, a transitional technology with significant distance and bandwidth limitations that prevent it from providing a meaningful competitive counterbalance.²⁸⁵ Thus, to match the capabilities of existing cable networks, DSL must give way to the deployment of end-to-end fiber optic transmission facilities.²⁸⁶ "The logical technological evolution of the network is the complete or near-complete replacement of copper lines with end-to-end fiber optic transmission facilities."²⁸⁷ That evolution promises enormous consumer benefits. But it will only come with massive new investment – as much as "\$200 billion from start to finish" – that must be made "without a firm grasp of what services will be demanded and at what price they will be purchased."²⁸⁸

²⁸³ *Id.* at 3068 (Separate Statement of Chairman Michael K. Powell).

²⁸⁴ Reinhardt Krause, *Cable's Program Extends Beyond TV*, Investors' Bus. Daily, May 16, 2002, at A6 (quoting James Robbins, CEO, Cox).

²⁸⁵ *E.g.*, High Tech Broadband Coalition Comments at 13 ("xDSL technology . . . [is] constrained by distance and other technical limitations").

²⁸⁶ See *Wireline Broadband NPRM*, 17 FCC Rcd at 3020-21, ¶ 1, 3026, ¶ 12; see also, *e.g.*, I. Burgess, Credit Suisse First Boston, Investext Rpt. No. 2989479, European Telecom Equipment Weekly Update – Industry Report at *4 (Nov. 12, 1999) ("Ultimately the limitations of copper cable ensure that the economic solution is to push fibre deeper and deeper into the network, closer and closer to the user."); M. Suydam, *Passive Aggressive*, CommVerge, May 1, 2001, at 40 ("[Passive Optical Network] is obviously much better than copper. While DSL is hot today, how long will that last? Eventually, everything will go into fiber.") (quoting Dong Liu, strategic marketing manager for networking and interface products, Agere Systems).

²⁸⁷ *Wireline Broadband NPRM*, 17 FCC Rcd at 3026, ¶ 12.

²⁸⁸ *The Internet Freedom and Broadband Deployment Act of 2001: Hearings Before the House Energy and Commerce Committee*, 107th Cong. (Apr. 25, 2001) (prepared testimony of Douglas Ashton, Bear Stearns & Co.).

There can be no question that even the *threat* of unbundling that new investment will keep it from taking place. Indeed, one need look no further than the dominant cable operators to see that this is so. The cable operators began their network upgrades in response to competition from DBS. By their own admission, they were able successfully to complete these upgrades – and deploy a robust broadband network – because they had no regulatory constraints limiting their ability to deploy the most efficient network architecture and make full use of their investment.²⁸⁹ They also have not been required to bear any additional infrastructure or operational costs as a result of continued regulation. These advantages, in turn, made it easier for them to incrementally upgrade the cable network to provide broadband services.²⁹⁰ In short, the dominant position of cable in the broadband market demonstrates how a minimal regulatory environment promotes broadband investment and deployment.

The CLEC comments in this proceeding, by contrast, demonstrate the dangers posed by pervasive unbundling. The CLECs make clear that they want access to broadband facilities not merely to enable a capital- and risk-free entry vehicle, but also to price arbitrage existing voice and data services provided to business customers who already have access to broadband and competitive choices.²⁹¹ This proposal – as much as any other issue raised in this proceeding –

²⁸⁹ See, e.g., Reply to Comments and Petitions to Deny Applications for Consent to Transfer Control at 94-95, MB Docket No. 02-70 (FCC filed May 21, 2002) (“AT&T/Comcast Reply”) (praising the Commission’s “hands off” approach to cable as facilitating “the rapid growth of high-speed cable Internet services – from essentially zero subscribers in 1996 to almost 8 million today”); Comments of AT&T Corp. at 5, 18, GN Docket No. 00-185, CS Docket No. 02-52 (FCC filed June 17, 2002) (“AT&T Cable Broadband Comments”) (explaining that cable’s deregulated status has allowed it to find the “most efficient solutions” to consumers’ needs and asserting that “the flexibility” that comes with that status is crucial to continued deployment).

²⁹⁰ See Stephen Pociask, Economic Policy Institute, *Putting Broadband on High Speed – New Public Policies to Encourage Rapid Deployment* at 5 (2002) (“asymmetric regulation has led to cable modem dominance”).

²⁹¹ See, e.g., AT&T Comments at 61 (AT&T intends “to provide the customer with ‘derived voice’ channels – *additional* voice lines over the *same* loop – by running the traffic through the high-frequency portion of the ILEC’s loop”); *id.* at 78 (“AT&T plans to offer a new voice/data offer in several markets that, in addition to the normal voice line provided over the low frequency portion of the loop, will include a DSL capability that can be used for Internet access and two ‘derived’ voice lines provided over the *high frequency* portion of the loop.”); see also Covad Comments at 37.

presents the Commission with the choice identified at the outset of these reply comments – between, on the one hand, true facilities-based competition and the deployment of new technologies; and, on the other, a purely unbundled universe in which price arbitrage counts for competition.

The choice is clear. The Commission’s goal in this proceeding should be to establish a regulatory environment that promotes the real competition that will come with broadband investment and deployment. Indeed, in light of the Commission’s “hands off” policy for cable, it is required to do so by section 706 of the Act, which requires the encouragement of broadband deployment “without regard to any transmission media or technology.”²⁹² And, in any case, sound policy mandates that result. If consumers are to realize the benefits of real competition in the broadband marketplace, it will only be if the Commission articulates a stable and lasting national broadband policy that encourages broadband innovation and investment while, at the same time, accommodating the rapid evolution and convergence of broadband technologies.

That policy must, first and foremost, set forth clear rules that cannot be undermined by the states. The industry needs certainty. If the Commission permits states to add their own layers of regulation to ILEC broadband investment, it will severely undermine the benefit of any pro-investment rules that it adopts in this proceeding. That policy must also take full account of the competitive realities in the broadband market, of the risk of the investments necessary to compete in that market, and of the costs that come with mandating access to ILEC facilities. And, finally, the driving feature of that policy must be a firm, unyielding commitment to true facilities-based, intermodal competition – to a world in which customers can receive robust broadband services over multiple pipes, and where *all* service providers have the same incentives to deploy new technologies and create innovative new services.

²⁹² 47 U.S.C. § 157 note.

A. The Commission May Not Lawfully Require Unbundling of the Packet-Based Network.

SBC's opening comments explained that its broadband services are provided in robust competition with other facilities-based providers, and that, accordingly, unbundling of the packet-based technologies that ILECs use to provide those services would be unlawful.²⁹³ Commenters fail to call into question either the factual predicate or the legal conclusion that flows from it.

1. Commenters generally see the broadband mass market as the one that is most difficult to serve. At the same time, however, most commenters do not seriously dispute the existence of competition in the mass market for Internet access. To the contrary, even AT&T – perhaps the loudest advocate of broadband unbundling obligations in this docket – has elsewhere stressed the “strong and growing competition” for broadband Internet access among cable operators, DSL providers, and “a number of fixed terrestrial wireless and satellite-based competitors.”²⁹⁴ As the D.C. Circuit recently explained, “[t]he Commission’s own findings . . . repeatedly confirm both the robust competition, and the dominance of cable,” in the broadband Internet access market.²⁹⁵

Commenters do, however, take aim at the conclusion that broadband services to the business market are competitive. Capitalizing on the Bell companies’ inability to provide interLATA services in most states, they claim that the relevant market is the “local” market for larger businesses, and that this so-called market is dominated by ILECs.²⁹⁶ SBC addressed this claim in detail in its reply comments in the *Broadband Nondominance Proceeding*, and we will not belabor the point here. The “local” market for broadband data services is a fiction. The large

²⁹³ SBC Comments at 55-58.

²⁹⁴ Public Interest Statement at 92, MB Docket No. 02-70 (FCC filed Feb. 28, 2002).

²⁹⁵ *USTA*, 290 F.3d at 428.

²⁹⁶ *E.g.*, AT&T Comments at 154-55.

customers that purchase these services do so for all types of data traffic, but obviously are willing to pay more for an offering that includes interLATA broadband services. For that reason, revenues from ATM and Frame Relay services are overwhelmingly weighted in favor of the IXCs' interLATA services.²⁹⁷ In addition, IXCs enjoy a significant advantage in the market because Bell companies cannot offer business customers comparable coverage or the convenience of one-stop shopping. Indeed, AT&T's own marketing of its ATM and Frame Relay services touts its ability to provide "high speed, low delay, *any distance*" service.²⁹⁸ WorldCom similarly boasts its ability to deliver ATM and Frame Relay services "as part of an overall, reliable, wholly-owned, local-to-global-to-local service" and to provide "seamless *end-to-end* connectivity between local/metro and IXC locations."²⁹⁹ The Commission itself has explained that, absent 271 approval, Bell companies are at a "serious disadvantage . . . in the data market."³⁰⁰ While it is true that the dominant IXCs have chosen to focus on more lucrative interLATA broadband services,³⁰¹ they are increasingly responding to Bell company competition by offering "local" service as well, and their prior business decisions not to do not create a separate "local" market for data services.

Nor is there any merit to the claim that there are distinct "small business" customers that are lacking in competitive broadband alternatives.³⁰² For one thing, as the Commission has

²⁹⁷ Memorandum Opinion and Order, *Applications of Ameritech Corp. and SBC Communications Inc. for Consent to Transfer Control*, 14 FCC Rcd 14712, 14841, ¶ 298 (1999) ("*SBC/Ameritech Order*") ("over 85% of large and medium business customer expenditures are for long-haul services").

²⁹⁸ AT&T Business, *AT&T Frame Relay Service, Services Overview* (emphasis added), at http://businesssales.att.com/products_services/framerelayproduct_catalogdisplay.jhtml.

²⁹⁹ WorldCom, *Metro Frame Relay Service* (emphasis added), at <http://www1.worldcom.com/us/products/datanetworking/framerelay/metro/>.

³⁰⁰ *SBC/Ameritech Order*, 14 FCC Rcd at 14841, ¶ 298.

³⁰¹ See Ron Kaplan, IDC, *U.S. Packet/Cell-Based Services Market Forecast and Analysis 2000-2005*, at 36 (2001) ("Carriers such as AT&T and WorldCom have introduced local frame relay offerings through their CLEC units, but the IXCs are not focusing on the 'local-only' market specifically.")

³⁰² See AT&T Comments at 93.

recognized, many “small business customers share significant characteristics with residential customers.”³⁰³ And, like many residential customers, many small business users receive broadband service from cable and satellite companies. Indeed, one survey concludes that, among businesses with fewer than 100 employees, those with broadband Internet access are evenly split between DSL and cable modem service.³⁰⁴

This trend can be expected to continue, as it is quite easy for cable companies to extend their facilities to reach these customers.³⁰⁵ Cox, for example, recently noted that “there were 300,000 small businesses within 50 feet of their coaxial drops, easily reachable.”³⁰⁶ A Time Warner Vice President also noted that the company recently signed up various businesses even though it required a network build-out, because “[i]t made a lot of sense to expand into the business sector.”³⁰⁷ AT&T counts small-business customers among its cable modem

³⁰³ Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, 14 FCC Rcd 2398, 2409, ¶ 28 (1999).

³⁰⁴ J. Applegate, *Speeding on Net with Broadband*, Chicago Sun-Times, at 46 (Feb. 6, 2001). See also Simon Flannery, *et al.*, Morgan Stanley Equity Research, *Annual Telecom Services Survey: The Customer Speaks* at 3 (Feb. 22, 2002) (“*Morgan Stanley Survey Report*”) (“Cable modems are used for Internet access by 29% of large businesses and 22% of medium sized businesses surveyed, a much higher penetration rate than we expected, however, these numbers warrant some close analysis.”).

³⁰⁵ See, e.g., Gail Lawyer & Charlotte Wolter, *The Cable Giant Stirs*, Sounding Board Mag., Dec. 1, 2001 (quoting Geoff Tudor, president and CEO, Advent Networks: the small business users “within 50 feet of [Cox’s] coaxial drops . . . could greatly expand the network’s revenue-generation potential.”); Mark Reilly, *New Cable Modem Target: Businesses*, Citybusiness, May 18, 2001 (Michael Fox, vice president and general manager of Time Warner Cable in Minneapolis, said roughly 50,000 businesses were located within range of the company’s cable service area, though one-third of the businesses already signed up needed some sort of network build-out. However, “[i]t made a lot of sense to expand into the business sector.”).

³⁰⁶ *Broadband Fact Report* at 5 n.9 (Mar. 1, 2002) (Exh. A to Comments of Verizon, CC Docket No. 02-33, *et al.* (FCC filed May 3, 2002)).

³⁰⁷ *Id.*

subscribers.³⁰⁸ And Comcast and others are “constructing cable in a number of *commercial-only* areas, presumably for advanced two-way services” to businesses.³⁰⁹

Fixed wireless and satellite are also options for small business users. The head of Hughes’ next generation interactive satellite broadband unit recently “outlined the extensive technological and financial commitments that Hughes has already made to provide high-speed broadband access to small businesses through its current DirecPCTM and DirecWay services. ‘With the services we are deploying today and with the enhanced capabilities we will offer . . . small businesses, wherever they are, will have affordable access to the broadband universe, without discrimination or financial disadvantages.’”³¹⁰ StarBand also offers a “StarBand Small Office” package, which gives these businesses “world-class, high-speed, two-way Internet access.”³¹¹ In short, even in the mass market, there is no dearth of broadband options for small business users, and no reason to interfere in the market’s response to their needs.

Indeed, if anything, small business users have *more* options for service than residential users, and it is therefore *less* likely that they will be harmed in any way by excluding broadband facilities from unbundling. Business users have access to a much broader range of services and competitive providers than residential users for the simple reason that they are willing and able to spend more for broadband services. Therefore, in addition to mass market broadband services, business owners that have more diverse broadband needs that require higher capacity transmission have many options to choose from, including Ethernet, Frame Relay, and ATM

³⁰⁸ Lisa Pierce, *Mediaone.net Domain Name Change: A Warning*, Network World (Mar. 4, 2002), at <http://www.nwfusion.com/columnists/2002/0304eye.html>.

³⁰⁹ See Andrew Afflerbach & David Randolph, *The Impact of Cable Modem Service on the Public Right of Way* at 6 (June 2002) (emphasis added) (Attach. G to Comments of Alliance of Local Organizations Against Preemption, GN Docket No. 00-185, CS Docket No. 02-52 (FCC filed June 12, 2002)).

³¹⁰ Hughes Network Systems Press Release, *Satellite Broadband Solves Digital Divide, Hughes Network Systems’ Executive, Mike Cook, Tells House Small Business Committee Today* (May 24, 2001), at <http://www.hns.com/default.asp?CurrentPath=corporate/news/pr/pr989235265753.htm>.

³¹¹ *Broadband Fact Report* at 6.

services and dedicated facilities of DS-1 or greater capacity. All of these alternatives are highly competitive, which is not surprising given the purchasing power of business users.

Only by focusing narrowly on DSL and cable services, and completely ignoring other competitive alternatives, are CLECs able to create the impression that business users have fewer broadband alternatives than mass-market users. The Commission, however, must consider the business market as a whole. As we discuss below, SBC believes that CLECs are not impaired without access to most DS-1 facilities. But, for present purposes, the point is that whatever conclusion the Commission reaches with respect to those facilities moots the issue here. If CLECs continue to get unbundled access to DS-1 loops, they will be able to use them to provide data services to businesses. If they do not, that means they can deploy their own, or have alternative facilities available to them. In either case, providing unbundled access to ILEC packet-based networks is unnecessary.

2. It is thus apparent that, to again quote AT&T, broadband competition is “fierce on every front.”³¹² And it is equally apparent that, in light of that “fierce” competition, the Commission may not unbundle broadband facilities. As SBC explained in its opening comments, and as noted above, the Commission’s mandate is not only to facilitate competition where it has not yet emerged, but to protect it where it has.³¹³ That means affirmatively precluding unbundling in already competitive service markets, where the availability of TELRIC-priced UNEs and all of the costs, inefficiencies, and uncertainty of UNE regulation can only serve to distort competition.

That is precisely the lesson of the D.C. Circuit’s *USTA* decision vacating the *Line Sharing Order*. As we have explained, that decision turns on the Commission’s prior failure to

³¹² AT&T Open Access Comments at 37.

³¹³ *E.g.*, SBC Comments at 20-21.

acknowledge the significant costs of unbundling, and to recognize that, where a market is already competitive, there can be no commensurate consumer benefits. As the court pointedly stated, “nothing in the Act appears a license to the Commission to inflict on the economy” the costs that come with unbundling, where there is “no reason to think doing so would bring on a significant enhancement of competition.”³¹⁴

Commenters urge the Commission to reach a different result. Indeed, they claim that – far from being required to acknowledge the state of competition in its unbundling analysis – the Commission is required to *ignore* it. Unsurprisingly, however, they provide no sound basis for such an illogical result.

Thus, for example, AT&T argues that “intermodal providers are alternatives under § 251(d)(2) only insofar as they make alternatives available *to the CLEC*.”³¹⁵ And because AT&T and its dominant cable brethren are not required to provide any access to other service providers, much less unbundled access at TELRIC prices, the inference is that CLECs must have access to ILEC facilities. WorldCom, CompTel, and Covad make similar claims, urging that the Commission is required to focus on the purported needs and wants of the “requesting carrier,” and is precluded from considering the state of competition in the relevant service market.³¹⁶

As a preliminary matter, the Commission’s decision not to require any type of competitive access to cable broadband facilities cannot be the basis for imposing unbundling requirements on ILEC broadband facilities. Having found that the market is sufficiently competitive that dominant cable broadband Internet access services should not be subject to *any* access or common carrier requirements, the Commission cannot possibly justify imposing

³¹⁴ *USTA*, 290 F.3d at 429.

³¹⁵ AT&T Comments at 40.

³¹⁶ WorldCom Comments at 44-46, 61; CompTel Comments at 50; Covad Comments at 43.

burdensome unbundling obligations on ILEC broadband Internet access services as a way of ensuring competitive access to broadband telecommunications. It would be patently unreasonable for the Commission to force ILECs into a “provider of last resort” role because the Commission has decided not to facilitate competitive access to the broadband capabilities of the dominant providers in the market.

In any event, as the D.C. Circuit explained, the CLECs’ position is “quite unreasonable.”³¹⁷ It would require that, even if a market were perfectly competitive – with 10 facilities-based competitors each with 10 percent of the market using 10 different technologies – it would be appropriate to ignore the presence of nine of them and require unbundling of the incumbent network if the other competitors did not make a practice of providing access to their competitors. Congress plainly did not create such an absurd scheme. The inquiry under the Act must include “the state of competition in the market,” and is not restricted to whether a particular CLEC wants to provide a service using a particular technology.³¹⁸ Indeed, that is why the 1996 Act does not speak of impairment in terms of a particular technology. Congress intended to eliminate the prior regime of “regulatory apartheid”³¹⁹ and “update our laws to take account of the blurring of the formerly distinct separation of cable, telephone, computer, and broadcast services.”³²⁰ Thus, the Act does not restrict the types of competition and technology that the Commission must consider in deciding whether to mandate unbundling of the incumbent’s network.³²¹

³¹⁷ *USTA*, 290 F.3d at 429.

³¹⁸ *Id.*

³¹⁹ 141 Cong. Rec. S7885 (daily ed. June 7, 1995) (Sen. Pressler, Chief Senate Sponsor of the 1996 Act).

³²⁰ *Id.* at S8067 (daily ed. June 9, 1995) (Sen. Leahy) (“We need to update our laws to take account of the blurring of the formerly distinct separation of cable, telephone, computer, and broadcast services....”).

³²¹ See *UNE Remand Order*, 15 FCC Rcd at 3782, ¶ 188 (considering mobile telephones and fixed wireless as alternatives to the local loop). Nor can it be said that section 251(c)(3)’s reference to “telecommunications service” trumps the section 251(d)(2) inquiry by permitting CLECs to define the scope of impairment. As a member of the D.C. Circuit noted at the line-sharing argument, the “service” contemplated “has to be defined in some way

Moreover, section 706 commands that the Commission take competing broadband technology platforms into account. Section 706 requires the Commission to “encourage the deployment” of broadband facilities,³²² “without regard to any transmission media or technology.”³²³ As the Commission concluded in the *UNE Remand Order*, section 706 accordingly requires the Commission to preclude unbundling where doing so will help “to ensure that advanced services are deployed on a timely basis to all Americans.”³²⁴

In the face of this holding – which is further supported by the D.C. Circuit’s mode of analysis in *USTA* – commenters contend that, whatever the goals of the Act as set out in section 706, the “impair” standard cannot be overridden by the Commission’s judgments regarding how best to facilitate the deployment of broadband technologies.³²⁵ That is absurd. The language of section 251(d)(2) and section 706 *requires* that the Commission consider the effect of unbundling on competition. The “at a minimum” language and the impair standard demand – as the Supreme Court held – that the Commission adopt limits on unbundling that are rationally related to the goals of the Act.³²⁶ Section 706 makes those goals clear and provides an additional statutory basis for protecting consumers and the development of competition. Under bedrock administrative law, then, the Commission has more than ample authority to ensure that the Act’s goals are furthered.³²⁷

that can make the very concept of impairment intelligible.” Transcript of Oral Argument at 10-11, *United States Telecom Ass’n v. FCC*, No. 00-1012, *et al.* (D.C. Cir. Mar. 7, 2002).

³²² Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 17 FCC Rcd 4798, 4826, ¶ 47 (2002) (“*Cable Modem Declaratory Ruling*”).

³²³ 47 U.S.C. § 157 note.

³²⁴ *UNE Remand Order*, 15 FCC Rcd at 3840, ¶ 317.

³²⁵ *E.g.*, AT&T Comments at 85; ALTS Comments at 6-7.

³²⁶ *Iowa Utils. Bd.*, 525 U.S. at 388 (“the Act requires the FCC to apply *some* limiting standard, rationally related to the goals of the Act”).

³²⁷ *See Chevron U.S.A. Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 843-45 (1984).

Nor does this plain language reading of the Act amount to an “end-run around § 10(d).”³²⁸ The Commission is not forbearing from anything when it interprets section 251(d)(2) and section 706. The Commission is *applying* section 251(d)(2) when it considers whether a carrier is impaired in its ability to provide broadband service. It is *applying* section 251(d)(2) when it considers as an additional factor, under the “at a minimum” language, whether unbundling will harm investment and competition. And it is *applying* section 706 when it considers whether unbundling will impede the deployment of advanced services on a timely basis. Forbearance is beside the point.

Indeed, the Commission considered and rejected all of these arguments in the *UNE Remand Order*. There, notwithstanding its (erroneous) conclusion that some competitors might be impaired with respect to some markets without unbundled access to packet switching, the Commission declined to order unbundling generally in order to “further the Act’s goal of encouraging facilities-based investment and innovation.”³²⁹ That conclusion was not challenged in the D.C. Circuit, and it remains valid today. There is accordingly no basis for the Commission to stray from its prior decisions not to impose unbundling requirements on packet-based technologies.

B. Extending Unbundling to Packet-Based Facilities Would Have a Disastrous Effect on Broadband Investment and Competition.

SBC’s opening comments explained the dire consequences that the mere *threat* of unbundling has had on its deployment of broadband technologies. Those comments also made clear that, unless those threats are removed, ILECs will be unable to justify the massive investment necessary to deploy a broadband network capable of providing a meaningful

³²⁸ See AT&T Comments at 87 (arguing that the Commission cannot take section 706 into account in its section 251(d)(2) analysis because that would “simply be a patently impermissible end-run around § 10(d) – as the D.C. Circuit’s decision in *ASCENT v. FCC*, 235 F.3d 662 (D.C. Cir. 2001), establishes”).

³²⁹ *UNE Remand Order*, 15 FCC Rcd at 3840, ¶ 316.

competitive counterbalance to the dominant cable incumbents. As analysts recognize, “[u]nless RBOCs are given regulatory relief from making their networks accessible to their rivals, they will continue to stall.”³³⁰

Commenters trivialize this concern as a mere scare tactic, and assume that ILEC broadband investment will occur regardless of the regulatory environment.³³¹ But ILECs are rational actors. They will accordingly invest in new technologies only if they conclude that the risks could someday yield concomitantly large rewards. As the D.C. Circuit recently explained, “[i]f parties who have not shared the risks are able to come in as equal partners on the successes, and avoid payment for the losers, the incentive to invest plainly declines.”³³²

Contrary to CLEC claims, moreover, this point is not merely theoretical. In March of this year, the Commission expressly confirmed that “some incumbent LECs [including SBC] have scaled back their DSL deployment plans; [and] cable’s lead over DSL has grown.”³³³ And they have done so in response to the threat of regulation. SBC, for example, has slashed capital spending by 20 percent, attributing its decision in part to “ever-increasing regulatory risk and uncertainty.”³³⁴ Verizon, for its part, “has significantly constrained deployment of DSL capability in [its] remote terminals” because of its concern that it might be forced to unbundle and allow the collocation of line cards.³³⁵

³³⁰ Tiffany Kary, *Cable Will Rule Broadband, Report Says*, CNET News.com (May 7, 2002), at <http://news.com.com/2100-1033-901501.html>.

³³¹ See, e.g., Southwest Competitive Telecommunications Association Comments at 14; AT&T Comments at 72.

³³² *USTA*, 290 F.3d at 424.

³³³ *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4804, ¶ 9.

³³⁴ See SBC Press Release, *SBC Outlines Comprehensive National Broadband Policy* (Dec. 19, 2001), at http://www.sbc.com/press_room/1,5932,31,00.html?query=20011219-1.

³³⁵ Verizon Comments at 35 (quoting Letter from Thomas J. Tauke, Senior Vice President – External Affairs & Public Policy, and Michael E. Glover, Senior Vice President & Deputy General Counsel, Verizon, to Michael K. Powell, Chairman, FCC, at 4 (FCC filed Nov. 6, 2001)); compare SBC Comments Attach. C at 3.

As noted above, moreover, the Commission need not merely take the ILECs' word on this matter. The High Tech Broadband Coalition notes that "unbundling requirements render mass DSL deployment unprofitable for ILECs and probably will reduce DSL investment by at least \$6 billion and possibly more than \$20 billion."³³⁶ And the equipment manufacturers – which, it bears repeating, have the incentive to take an unbiased view of the matter – uniformly recognize that the existence of unbundling obligations on broadband facilities creates costs that drastically limit the pace of ILEC deployment.³³⁷

Moreover, CLECs uniformly ignore the enormous costs and network inefficiencies created by burdensome unbundling requirements. SBC has provided the Commission with detailed information regarding the implementation and ongoing operational costs associated with unbundling packet-based broadband facilities.³³⁸ What is more, the ill effects of unbundling obligations also limit ILECs' ability to design new and innovative services and create efficient network solutions to consumers' broadband needs. The inaptly named "line card collocation" requests that were made of Project Pronto, for example, threatened prematurely to exhaust facilities and limit the services that SBC could provide to consumers.³³⁹ Threats such as these can only harm deployment. As AT&T has explained, it is critical that broadband providers "retain the flexibility" to design their services to reflect "actual commercial experience."³⁴⁰ By

³³⁶ High Tech Broadband Coalition Comments at 30. *See also* Corning Comments at 4-6 (citing study that found applying unbundling rules to fiber-to-the-home results in an 84-percent reduction in fiber build-out).

³³⁷ *See supra* pp. 56, 98. A few commenters quote SBC's statements, at the time it announced Project Pronto, that the cost of deployment would be largely offset by cost savings resulting from voice efficiencies. For one thing, however, those cost savings did not materialize. And, of course, the actual costs of deployment were altered sharply by actual regulations (and the prospect of new ones). In any event, SBC's ability to achieve more efficient network design hardly creates an excuse for adding unnecessary costs that will not yield any significant "enhancement of competition." *USTA*, 290 F.3d at 429.

³³⁸ *See* SBC Comments Attach. C at 2-6; Letter from James K. Smith, SBC Communications Inc., to William F. Caton, Acting Secretary, FCC, Attach. at 12, CC Docket Nos. 01-338, 96-98 & 98-147 (Mar. 25, 2002).

³³⁹ *See id.*

³⁴⁰ AT&T Cable Broadband Comments at 18.

requiring a network design conducive to permitting facilities to be turned over the CLECs, however, unbundled access stands in the way of that flexibility, and accordingly has the “disastrous” effect of preventing carriers from reaching the “most efficient solutions” to consumers’ needs.³⁴¹

Burdensome unbundling requirements produce a sub-optimal allocation of resources that has a negative effect on both the supply and demand of broadband services. On the supply side, ILECs will not deploy innovative broadband architectures if regulators impose or threaten to impose unbundling requirements that destroy the economic viability of the service. This will have the effect of reducing the availability of broadband services and allowing cable modem providers to expand their lead in the market. On the demand side, costly unbundling requirements will be passed on to end users in the form of higher prices for broadband services.

Nor can there be any serious suggestion that these effects are offset by the prospect of TELRIC pricing.³⁴² Even aside from the fact that regulated prices do nothing to remediate the design constraint and service quality issues noted immediately above, TELRIC prices are designed to be “highly attractive to CLECs.”³⁴³ The flipside is that those prices are highly *unattractive* to ILECs. And ILECs, of course, are not in the business of designing and deploying new services for which they can only charge highly unattractive prices.

More fundamentally, apart from whether one believes TELRIC is a sound methodology for setting rates, the fact is that a UNE rate is set by a regulator, not the market. It permits a requesting carrier to share in the rewards of successful investments, while bearing none of the risk of unsuccessful ones. It therefore puts a firm limit on the upside that an ILEC can hope to

³⁴¹ *Id.* at 5.

³⁴² *E.g.*, AT&T Comments at 20 (“TELRIC-based rates fully compensate the ILECs for all the risks they incur in making particular investments.”); *see also id.* at 72, 82.

³⁴³ *USTA*, 290 F.3d at 424.

obtain in the market. Yet because ILECs will not be compensated for the investments that don't pan out, there is no limit to the downside. That is why WorldCom (quite deliberately) says that TELRIC "takes into account the risk associated with building a network" that ILECs and CLECs actually "use."³⁴⁴ As the D.C. Circuit observed, that provides no assurance against the risk on investments that do not bear fruit.³⁴⁵

Commenters nevertheless contend that ILECs should be required to unbundle broadband facilities because the resulting *intramodal* competition will stimulate investment. They take as support for this theory the so-called fact that ILECs originally deployed DSL in response to competition from CLECs, and assert that, without such competition, ILECs will put broadband on the shelf in order to protect secondary line revenues.³⁴⁶

This is pure revisionism. The truth is that ILECs developed DSL as "a potential competitor to cable television services."³⁴⁷ Due to the application of telephone regulation to the new video services, however, ILECs "found themselves unable to compete head-to-head with cable companies" in the provision of video programming.³⁴⁸ As a result, ILECs did not deploy DSL. Subsequently, as AT&T itself loudly proclaims, ILECs rolled out DSL as an attempt to compete against cable's broadband services in the *residential* market.³⁴⁹ CLECs, by contrast, have by and large targeted broadband business customers, which ILECs and their competitors have been serving for years.

³⁴⁴ WorldCom Comments at 69.

³⁴⁵ See *USTA*, 290 F.3d at 424.

³⁴⁶ AT&T Comments at 73; ALTS Comments at 11-12; CompTel Comments at 36-37.

³⁴⁷ Pociask, *supra* note 290, App. C at 25.

³⁴⁸ *Id.* App. C at 25-26.

³⁴⁹ See AT&T/Comcast Reply at 72 ("The deployment of cable Internet services spurred the incumbent LECs to accelerate their deployment of DSL-based high-speed alternatives."). See also FCC Staff Report at 27; Shelanski Decl. ¶ 9; William E. Kennard, Chairman, FCC, *The Unregulation of the Internet: Laying a Competitive Course for the Future*, Remarks at the Federal Communications Bar Association's Northern California Chapter, San Francisco, California (July 20, 1999) ("where cable modem service has been introduced, DSL has followed").

If, as commenters claim, ILECs were deploying DSL in response to CLEC competition, they would have focused on those same business customers. In fact, however, the ILECs themselves have concentrated on the residential market.³⁵⁰ Moreover, if ILECs were deploying broadband in response to CLECs, they would never have decided to invest in plans (such as Project Pronto) that *extend* the reach of DSL into areas that do not currently have it. If ILECs were concerned about protecting secondary line revenues, these investments would never have happened in the first place.

Nor can commenters claim support for this theory from the decision of some ILECs to raise DSL prices in the last year.³⁵¹ As an initial matter, this argument rests on the fallacy that, in competitive markets, prices only go down. AT&T and WorldCom have been claiming for years that long distance is robustly competitive, yet each of them recently increased prices to the overwhelming majority of their customers.³⁵² The truth is that, particularly in a developing market, prices are likely to fluctuate as competing carriers seek to understand the dynamics of the marketplace and adapt to their own cost structures. AT&T should know this. AT&T

³⁵⁰ xDSL.com, *TeleChoice 4Q01 DSL Deployment Summary* (Feb. 11, 2002), at http://www.xdsl.com/content/resources/deployment_info.asp (as of fourth quarter 2001, ILECs served 81 percent residential customers versus 18 percent business customers, whereas CLECs served 57 percent business customers and 42 percent residential customers). CLECs, by and large, have deployed SDSL, which is directed toward the business market, whereas ILECs have deployed mainly ADSL, which can be directed at both businesses and residences but is primarily a residential service since the upstream speeds are slower. See Adtran White Paper, *The Voice over DSL (VoDSL) Marketplace* at 4, at <http://www.adtran.com/all/Doc/0/ROSPCLLJO7AH39QU038BE81ID8/CL006.pdf> (“Initially, the ILECs used asymmetric DSL (ADSL) as a means to target the consumer market while the DLECs used symmetric DSL (SDSL) as a target to the SME market.”); T. Liani, Merrill Lynch Capital Markets, Investext Rpt. No. 2895762, Orckit Communications – Industry Report at *22 (July 15, 1999) (“While DSL comes in a variety of flavors to cover all types of customers, the most popular are business-grade DSL (SDSL) and residential-grade DSL (ADSL).”); L. Carvalho, Morgan Stanley Dean Witter, Investext Rpt. No. 2056686, Latin America Telecom Services: Update – Industry Report at *17 (Jan. 25, 2000) (“ADSL’s asymmetric datastream more closely reflects the nature of residential Internet traffic than do the symmetrical transmission technologies suited only for business applications. In the residential market, upstream requests for information (such as sending an e-mail message) are typically much less data-intensive than the downstream delivery of that data (such as downloading a video clip).”).

³⁵¹ AT&T Comments at 76.

³⁵² See Sam Ames, *AT&T, MCI Boost Long-Distance Fees*, CNET News.com (Jan. 2, 2002), at <http://news.com.com/2100-1033-277503.html>.

recently imposed a \$7 per month price increase on its modem-owning customers.³⁵³ And, over the last year, the price of cable modem service has risen faster on a percentage basis than DSL-based Internet access.³⁵⁴

In any case, to the extent SBC has increased DSL prices, it was due to higher-than-expected costs, not the desire to protect narrowband. As the CEO of one DSL vendor has observed, “[r]ight now DSL is not profitable for any of the carriers, Bells or others . . . \$40 per month isn’t working and that’s why the prices are going up.”³⁵⁵ Covad’s director of marketing similarly observed that “regional Bells, as well as competitive providers, created immense demand for DSL by keeping the prices so low. Once they realized they couldn’t satisfy those demands and create any meaningful revenue, it was time to raise the prices and only serve those customers willing to pay a premium.”³⁵⁶ Industry analysts agree that DSL prices went up because carriers could not cover their costs at the lower rates, given the costs of provisioning.³⁵⁷

³⁵³ See Rachel Konrad, *Modem Owners Pay More for AT&T*, CNET News.com (May 28, 2002), at <http://news.com.com/2100-1033-923512.html>.

³⁵⁴ *Id.* (“[C]able broadband Internet prices rose 12 percent in 2001 Consumer DSL prices rose 10 percent during the same time frame.”)

³⁵⁵ Evan Blackwell, *Reality Walks In*, BroadbandWeek.com (Apr. 16, 2001), at http://www.broadbandweek.com/news/010416/print/010416_news_cover.htm.

³⁵⁶ Brian Ploskina & Dana Coffield, *Top Dollar DSL*, Interactive Week (Feb. 18, 2001), at <http://www.iolwest.com/home/Top-Dollar%20DSL.htm>.

³⁵⁷ “DSL and cable providers have discovered some hard truths. ‘Both industries are finding that it’s costing more, taking longer, and proving a little more difficult to do.’” Sam Ames, *Broadband Net Rates Continue to Climb*, CNET News.com (May 3, 2001), at <http://news.com.com/2100-1033-257031.html?legacy=cnet> (quoting an analyst at Deutsche Bank). Mathew Davis, Yankee Group Senior Analyst, notes that “[n]ow you’re seeing rates go up so DSL providers try to turn a profit.” Tom Spring, *Verizon Joins Broadband Price Hike Parade*, PCWorld.com (May 2, 2001), at <http://www.pcworld.com/news/article/0,aid,48945,00.asp>. Another analyst notes that “I doubt that anybody, including the [Baby Bells], makes money with consumer DSL.” John Shinal, *Covad Continues Futile Search for DSL Profit*, Forbes.com (June 20, 2000), at <http://www.forbes.com/2000/06/20/mu2.html> (quoting Dataquest analyst, Kathy Hacker) (alteration in original). Morgan Stanley characterizes the DSL rate increases as an “[e]ffort to move toward profitability sooner on DSL deployment” and says that “[o]perating costs, particularly customer service, marketing, and maintenance, have been higher than expected.” R. Bilotti, *et al.*, Morgan Stanley, Dean Witter, *Broadband Cable Television* at 42 (July 3, 2001). Kinetic Strategies president Michael Harris has noted that “SBC raised prices 25 percent and additions dropped 25 percent. . . . Yes, they are committed to DSL but they are committed in a way that doesn’t crush earnings.” Matt Stump & Karen Brown, *Q1: Broadband Sales Show Strength*, BroadbandWeek.com (May 21, 2001), at http://www.broadbandweek.com/news/010521/010521_news_num.htm. “Operating costs, particularly customer service, marketing, and maintenance, have been higher than expected. Subscriber acquisition costs have

A recent study by McKinsey and J.P. Morgan estimated the average revenues for ILEC DSL deployment to be \$47 per customer per month in 2002, with recurring costs estimated to be \$65 per customer per month.³⁵⁸ And, while CLECs attempt to make an issue of these DSL price increases, they conveniently ignore the fact that extending unbundling requirements to broadband facilities would create enormous costs and would inevitably result in higher prices for consumers.

Picking up on a theme developed at length in comments in response to the Commission's *Wireline Broadband NPRM*, commenters also contend that the disincentives created by the Commission's unbundling rules are meaningless because there is "no current shortage of 'broadband supply.'"³⁵⁹ The CLECs would have the Commission believe there is plenty of broadband out there and the "principal limitation on increased deployment of broadband is one of *demand*."³⁶⁰

But, as SBC explained in detail in its *Wireline Broadband NPRM* reply comments,³⁶¹ it is wrong to suggest that demand is a greater obstacle to widespread broadband adoption than the pace of deployment. As Chairman Powell has noted, "[w]idespread consumer adoption of broadband requires both availability and demand," and, "in keeping with the Act's mandate that we encourage deployment 'to all Americans,' we must continue to find new ways to promote broadband infrastructure investment."³⁶²

been about \$200-300 more for RBOCs than for the cable operators." R.A. Bilotti, Morgan Stanley, Dean Witter, Telecom – Cable: The Sequel: Open Access is Better – Industry Report at *8 (June 29, 2001).

³⁵⁸ John Haring & Jeffrey H. Rohlfs, *The Disincentives for Broadband Deployment Afforded by the FCC's Unbundling Policies* at 17 (Apr. 4, 2002) (attached to High Tech Broadband Coalition Comments).

³⁵⁹ AT&T Comments at 69; CompTel Comments at 32.

³⁶⁰ AT&T Comments at 71.

³⁶¹ Reply Comments of SBC Communications Inc. at 12-14, CC Docket Nos. 02-33, 95-20 & 98-10 (FCC filed July 1, 2002).

³⁶² Response of Chairman Michael K. Powell to Senator Ernest F. Hollings.

Moreover, as the High Tech Broadband Coalition notes, the way to increase demand is to reach a critical mass of users with robust broadband services.³⁶³ “The lack of availability of broadband applications . . . does not stem from lack of consumer demand, but rather from a ‘chicken and egg’ problem.”³⁶⁴ “Without more broadband applications, some consumers believe that the price of broadband does not merit the cost, and thus, do not purchase broadband connections. Because there are not enough consumers with broadband connections, companies do not develop additional broadband applications that would attract new subscribers.”³⁶⁵

To the extent there is a demand problem, then, the solution is the deployment of “facilities capable of providing broadband services to reach a critical mass of customers.”³⁶⁶ The Commission itself has acknowledged this solution, noting that “[a]nalysts predict that new and unforeseen capacity hungry applications that require advanced service platforms will drive demand, and in turn deployment, in the future.”³⁶⁷ What SBC seeks – in this and related proceedings – is the freedom to develop and deploy these advanced service platforms, without the added costs and uncertainty that come with the threat of unbundling. The market-leading cable broadband providers enjoy that freedom today, and the Commission has recently declined to impose even the most rudimentary Title II obligations on those offerings. Law and policy dictate that it strive to provide the same regulatory freedom to ILECs.

C. Specific Broadband Elements.

The CLECs’ comments are chock full of broadband unbundling proposals. They want new UNEs created, old UNEs redefined, existing limitations lifted, and new limitations

³⁶³ High Tech Broadband Coalition Comments at 17-18.

³⁶⁴ *Id.* at 19.

³⁶⁵ *Id.* at 20.

³⁶⁶ *Id.*

³⁶⁷ Third Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, 17 FCC Rcd 2844, 2871, ¶ 64 (2002) (“*Third Advanced Services Report*”).

precluded. But, boiled down to their essence, these proposals all add up to the same thing: unbridled access to ILEC broadband facilities – including a new “data-P” – that would permit these carriers to free-ride on ILEC investment without putting any skin in the game. If the Commission is serious about encouraging the deployment of new broadband technologies, it must stand firm against these proposals.

The Commission’s Existing Rules. Many CLECs continue to ask the Commission to unbundle the so-called “unified” loop – a creature of their collective imagination that purportedly includes fiber feeder, multiplexing equipment, and other electronics between the customer’s premises and a distribution frame in the central office.³⁶⁸ These commenters further claim that DSLAMs should be considered part of the loop element and not part of the packet switching element.³⁶⁹

This question was decided in the *UNE Remand Order*, however, and there is no basis to reverse course. As we explained in our opening comments, the *UNE Remand Order* declined to order unbundling (except in very limited circumstances) of packet switching, including packet technologies deployed in the loop.³⁷⁰ It did so for two basic reasons. First, the Commission explained that “equipment needed to provide advanced services, such as DSLAMs and packet switches, are available on the open market at comparable prices to incumbents and requesting carriers alike.”³⁷¹ Second, citing section 706, the Commission expressed concern that it “not

³⁶⁸ See, e.g., AT&T Comments at 163; Sprint Comments at 27, 38; WorldCom Comments at 113. In addition to the failure of these claims to satisfy the “impair” test, the Eighth Circuit has made clear that ILECs cannot be required to provide “superior quality” loops. See *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 812-13 (8th Cir. 1999), *aff’d in part, rev’d in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). That ruling went unchallenged in the Supreme Court.

³⁶⁹ AT&T Comments at 179; Sprint Comments at 27, 42; WorldCom Comments at 101.

³⁷⁰ *UNE Remand Order*, 15 FCC Rcd at 3838-39, ¶ 313; 47 C.F.R. § 51.319(c)(5); Order Clarification, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 16 FCC Rcd 4628 (2001).

³⁷¹ *UNE Remand Order*, 15 FCC Rcd at 3836, ¶ 308; see *id.* (“Because the incumbent LEC does not retain a monopoly position in the advanced services market, packet switch utilization rates are likely to be more equal.”).

stifle burgeoning competition in the advanced service market,” and noted that “regulatory restraint . . . may be the most prudent course of action in order to further the Act’s goal of encouraging facilities-based investment and innovation.”³⁷² The Commission correctly based its decision on broader considerations of competition and investment in the broadband market, not on a myopic technical analysis of each new piece of broadband equipment being deployed in the network.

That same approach is equally valid today. As to the *UNE Remand Order*’s first rationale, the widespread deployment of packet switches dispels any notion that CLECs are disadvantaged in any meaningful way without access to those facilities.³⁷³ Since the *UNE Remand Order*, CLEC packet-switch deployment has more than doubled.³⁷⁴ By ALTS’s count, it has increased to 9,500.³⁷⁵ More than 55 CLECs now operate their own packet switches in more than 200 different cities.³⁷⁶ CLECs plainly can, and do, deploy their own packet switches.

As to the Commission’s second rationale – the desire to facilitate the deployment of broadband technologies – the above discussion makes clear that, if anything, the case is stronger today than it was three years ago. The cable companies’ dominance of the emerging broadband market is only growing, and the proposed AT&T/Comcast merger threatens to solidify it.³⁷⁷ As discussed above, to provide a meaningful counterbalance, ILECs must invest massively in a new packet-based network that extends fiber to the customer’s premises. Yet, because of the threat of regulation over NGDLC – which is in essence an intermediate step on the way to an even more

³⁷² *Id.* at 3840, ¶ 316.

³⁷³ SBC Comments at 58-59.

³⁷⁴ *See id.*; *Fact Report* at II-23.

³⁷⁵ *2002 Local Competition Report* at 16.

³⁷⁶ *See Fact Report* at II-23.

³⁷⁷ *See* Comments of SBC Communications Inc., MB Docket No. 02-70 (FCC filed Apr. 29, 2002).

robust packet-network – ILECs are basically standing still. The Commission can choose to promote competition between ILECs and cable companies in the mass market – with the additional competition that will inevitably come if the Commission removes the threat of regulation from the industry – or it can ensure entrenched cable dominance, with CLECs fighting against one another to arbitrage ILEC prices for competitive services in the business market. To “further the Act’s goal of encouraging facilities-based investment and innovation,”³⁷⁸ it must choose the former.

Commenters have no response to the Commission’s conclusions regarding the competitive and investment effects of unbundling, so they largely ignore them. Instead, they seek to narrow the Commission’s focus to determining the precise technical nature of each new piece of broadband equipment deployed in the network – all directed toward the end goal of subjecting all ILEC packet-based broadband loop investment to UNE regulation. This incremental element-by-element approach would embroil the Commission in never-ending regulatory proceedings and require that the Commission micromanage the deployment of every new technology and innovation in the ILECs’ networks. Such an approach is wholly at odds with the need for a stable regulatory framework that provides the certainty required to encourage ILECs to make this risky investment in new technologies and services over the long term. In the end, it will chill network evolution, as regulation and continued uncertainty engulf new technologies. And consumers would bear the brunt of these effects, as the dampening effects on ILEC investment and innovation would deprive them of the benefits that would otherwise flow from robust broadband deployment and competition in the broadband market.

Commenters’ principal support for their claim that the Commission should engage in an element-by-element dissection of the packet-based network is the assertion that the packet-based

³⁷⁸ *UNE Remand Order*, 15 FCC Rcd at 3840, ¶ 316.

network is incremental to – and integrated with – the legacy circuit-switched network, such that trying to carve out the former from unbundling obligations would be administratively impractical.³⁷⁹ In truth, however, as SBC’s opening comments demonstrated,³⁸⁰ SBC provides broadband services through a distinct packet-based network that interconnects with the legacy network through standard interfaces that are available for use by ILECs and CLECs alike. To be sure, SBC’s existing xDSL offerings use portions of the legacy copper network from the customer premises to the remote terminal. But the broadband capability delivered through a packet-based transmission medium is distinct from the legacy network. And it is that portion of the network – from the remote terminal in a Pronto configuration and from the customer premises in a BPON configuration through the end office and the ILEC’s packet network – that qualifies as new investment in broadband infrastructure that should be protected from unbundling.

Although AT&T recognizes that the Commission has, for the most part, excluded packet switching from unbundling, it disputes that the Commission also intended to exclude packet technologies and other advanced electronics deployed in the loop. According to AT&T, the Commission’s rule that codifies that exclusion is some sort of mistake that does not, in fact, mean what it says.³⁸¹ There was no mistake. The Commission meant what it said in the *UNE Remand Order*. Except in unusual circumstances, packet technology – including “packet switching capability”³⁸² and “electronics used for the provision of advanced services, such as [DSLAMs]”³⁸³ – need not be unbundled. The Commission should see through commenters’

³⁷⁹ See, e.g., AT&T Comments at 116.

³⁸⁰ SBC Comments at 45.

³⁸¹ AT&T Comments at 179-80.

³⁸² 47 C.F.R. § 51.319(c)(4).

³⁸³ *Id.* § 51.319(a)(1).

transparent attempt to overturn the Commission’s decision not to extend UNE regulation to broadband investment, and reject it.

Nor is there any basis to the contention that, because access to a “unified” loop would allow CLECs to more easily piggyback on ILECs’ broadband facilities, it will lead to more *voice* competition.³⁸⁴ For one thing, the notion that the Commission should regulate broadband to facilitate voice competition gets things exactly backwards. Decades of antitrust precedent, Commission regulation, and congressional pronouncement have affirmed precisely the opposite approach – mandating open access to the “bottleneck,” “essential,” or competitively “necessary” network elements and services, while deregulating the competitive ones. In any event, CLECs have ample opportunities to offer voice and data over the legacy network. In addition to making use of other broadband technologies, CLECs – whether working alone or with a partner³⁸⁵ – can use a standalone unbundled loop to provide broadband telecommunications service in conjunction with local voice service. Likewise, CLECs can access the copper distribution subloop at the first accessible point in the ILEC’s network, which is typically either the remote terminal itself or more often the serving area interface, and use it to provision DSL service.³⁸⁶ As for the other facilities that ILECs use (or will use) to provide broadband services – *i.e.*, the fiber feeder that SBC has already deployed as part of Project Pronto, the additional fiber it deploys as part of BPON fiber-to-the-home, and the various other facilities and electronics that make up the packet-based network – they represents new investment that should be rendered off-limits for unbundling.

³⁸⁴ See AT&T Comments at 95; AT&T’s Huels Decl. ¶ 68 (Attach. D to AT&T Comments).

³⁸⁵ WorldCom Comments at 103 (“it is possible for data providers to partner with competitive voice providers and engage in line splitting”).

³⁸⁶ Comments of SBC Communications Inc. at 20-21, CC Docket Nos. 98-147 & 96-98 (FCC filed Feb. 27, 2001). See also *UNE Remand Order*, 15 FCC Rcd at 3794-95, ¶ 218.

The UNE Remand Order's Treatment of Packet Switching Conditions. SBC's opening comments explained that, in light of the marketplace evidence regarding CLEC deployment of packet switching, CLECs are not impaired *in any circumstances* without access to packet switches. Yet the *UNE Remand Order* permits unbundling in certain narrow circumstances.³⁸⁷ The mere existence of this exception has caused uncertainty and confusion among state commissions, which have used it to attempt to impose a broader unbundling requirement than the Commission intended.³⁸⁸ The exception should be abolished.

Some commenters, however, claim that the Commission should go in the opposite direction, and *broaden* the circumstances in which packet switching is available as a UNE. They argue that collocation in remote terminals is difficult, and that, accordingly, even if they can obtain their own packet switches, they have no place to put them.³⁸⁹

We discuss in more detail below the legal infirmity of efforts to bootstrap such operational concerns into UNEs.³⁹⁰ Those arguments are equally applicable here. For present purposes, it is enough to add that, while CLECs are correct that broadband deployment in remote terminals is difficult, it is equally difficult for ILECs and CLECs – and it is particularly risky for both because of cable's dominant position in the market. Yet ILECs are seeking to make these investments in remote terminals and fiber facilities in order to extend the reach of mass-market broadband services, and CLECs are not. The simple fact that ILECs alone are undertaking the inherent challenges of broadband deployment cannot provide the basis for allowing CLECs to obtain a free ride on that investment and the broadband facilities that result from it.

³⁸⁷ The Commission requires unbundled access to packet switching where: (1) the ILEC has deployed DLC systems; (2) there is no spare copper available; (3) the ILEC has not permitted a CLEC to place a DSLAM in its remote terminal; and (4) the ILEC has deployed packet switching capability for its own use. See 47 C.F.R. § 51.319(c)(4).

³⁸⁸ SBC Comments at 40-43, 60-65.

³⁸⁹ AT&T Comments at 191-92; Sprint Comments at 44; WorldCom Comments at 109.

³⁹⁰ See *infra* pp. 117-18.

CLECs also complain that requiring them to use all-copper loops – which the packet-switching exception does in certain circumstances – relegates them to a diminished level of service.³⁹¹ But the fact of the matter is that all-copper loops are what CLECs have access to today. As SBC explained in its opening comments, it is nonsensical to argue that CLECs become impaired when they are not then given access to something that is subsequently deployed.³⁹² The argument is also lawless, for the Eighth Circuit made clear that CLECs do not have a right to a superior network – and that holding went unchallenged in the Supreme Court.³⁹³ As to the suggestion that the deployment of NGDLC degrades existing loops by causing interference, any such issues are equally applicable to ILEC and CLEC use of copper loops. Further, any interference issues are properly the subject of industry standards groups, and indeed this particular issue is the subject of a technical standard that, barring objection, will issue in August of this year.³⁹⁴

High-Frequency Portion of the Loop (“HFPL”). A number of commenters claim impairment without access to the HFPL.³⁹⁵ The *USTA* decision lays these arguments to rest. Vacating the Commission’s *Line Sharing Order*, the Commission made clear that any subsequent proceedings on remand must take account of the “competitive context.”³⁹⁶ As discussed above and in our opening comments, that context is such that there is no reason to

³⁹¹ AT&T Comments at 198-201; WorldCom Comments at 112.

³⁹² SBC Comments at 13-20.

³⁹³ For this same reason, the Commission must reject out of hand Sprint’s argument that ILECs must be ordered to install new equipment for CLECs, such as equipment cards, based on Sprint’s belief that “ILECs should have an obligation to construct new elements.” Sprint Comments at 52-53. Unsurprisingly, Sprint nowhere mentions in its comments the Eighth Circuit’s decision, for it decimates Sprint’s argument. *See Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 812-13.

³⁹⁴ *See Proposed Text for Spectrally Compatible RT Deployments*, T.1E1.4/20020116R1, Committee T1 – Telecommunications (Apr. 2002).

³⁹⁵ *E.g.*, Covad Comments at 35-37; ALTS Comments at 80-82; WorldCom Comments at 102-05.

³⁹⁶ *USTA*, 290 F.3d at 429.

believe that line-sharing “would bring on a significant enhancement of competition.”³⁹⁷ On the contrary, it would only *limit* competition, by driving up ILECs’ costs and rendering them less able to compete with the dominant cable incumbents.

Moreover, as Verizon properly explains, line-sharing in fact confers a *benefit* on CLECs that ILECs do not enjoy. In the absence of a line-sharing requirement – but with CLECs able to obtain unbundled access to a copper loop – ILECs and CLECs have the same ability to “line share” by providing *both* voice and data over that line. Likewise, both ILECs and CLECs have the same ability to provide *only* voice (or only data) over that line. By contrast, the *Line Sharing Order* permitted CLECs (and CLECs alone) to obtain access only to the HFPL, while requiring the ILEC to retain the low frequency portion. As Verizon properly explains, however, “[t]he withholding of a unique benefit . . . cannot be considered impairment, when without the benefit the CLEC and the ILEC are in a competitively neutral position.”³⁹⁸

II. SWITCHING

A. Circuit Switching.

In the *Verizon* decision, the Supreme Court specifically singled out digital switches as an example of a facility that was “sensibly duplicable.”³⁹⁹ The evidence set forth in the *Fact Report* demonstrates why. Among other things, the *Fact Report* shows that:

- more than 200 CLECs have deployed more than 1,300 competitive circuit switches;
- CLECs are *using* these switches to serve nearly 23 million access lines;
- they are *using* these switches to serve customers in BOC wire centers accounting for nearly 86 percent of all BOC access lines; and

³⁹⁷ *Id.*

³⁹⁸ Verizon Comments at 85.

³⁹⁹ *Verizon*, 122 S. Ct. at 1672 & n.27.

- in the top 100 MSAs, CLECs are *using* these switches to serve customers in more than 80 percent of BOC wire centers, and those wire centers account for more than 95 percent of BOC access lines.⁴⁰⁰

Nor is it just AT&T and WorldCom (which, ironically, are the principal users of the UNE-P) that are using their own switches. Other CLECs have deployed nearly 1,000 circuit switches, and the 15 largest CLECs other than AT&T and WorldCom have deployed nearly 500 of them.⁴⁰¹ These switches, moreover, have been deployed in both large and small communities throughout the country. To be sure, there are more of them in suburban and urban areas, but CLECs also have deployed their own switches in such places as Seguin, Texas; Mojave, California; Lenexa, Kansas; Mishawaka, Indiana; and other small communities.⁴⁰² If a CLEC can use its own switch in Mishawaka, it can do so anywhere.

This evidence is dispositive. Three years ago, in the *UNE Remand Order*, the Commission found that “a significant number of competitive switches have been deployed,”⁴⁰³ but, in a decision from which Chairman Powell dissented, the Commission nevertheless found that CLECs were impaired in their ability to *use* those switches in all but the most narrow of circumstances. The Commission so concluded, in part, because the evidence in the record focused largely on switch *deployment*, as opposed to switch *use*. Even so, that decision defied common sense because it suggested that CLECs had deployed hundreds of switches despite their inability to use those switches to any significant degree. Indeed, the limited – and conditional – carve-out that the Commission established covered only two percent of SBC wire centers and three percent of its switched access lines.⁴⁰⁴

⁴⁰⁰ *Fact Report*, App. C, at C-5.

⁴⁰¹ *Id.* at Figure II-1.

⁴⁰² *Id.*, App. B.

⁴⁰³ *UNE Remand Order*, 15 FCC Rcd at 3809, ¶ 254.

⁴⁰⁴ This carve-out was so limited that SBC and most other BOCs chose not to meet the onerous conditions necessary to qualify for it.

If ever there was any doubt about the matter, the *Fact Report* puts to rest any issue as to whether CLECs can use the switches they have deployed. As noted, it shows that CLECs are *using* their switches to serve *millions* of customers – 23 million and counting to be precise – and it shows that they are doing so in BOC wire centers that account for the overwhelming majority of all BOC access lines.⁴⁰⁵

The *Fact Report* also shows, moreover, that CLEC switch deployment continues at a rapid pace. Since the *UNE Remand Order*:

- competitive circuit switch deployment has increased 86 percent;
- the number of CLECs with 10 or more circuit switches has increased 80 percent; and
- the number of CLECs with 20 or more circuit switches has increased 167 percent.⁴⁰⁶

And the *Fact Report* shows that CLECs serve more and more lines with those switches:

- The number of lines served by competitive circuit switches has increased 283 percent since the *UNE Remand Order*.
- The number of telephone numbers ported by CLECs increased 73 percent from 2000 to 2001 alone.⁴⁰⁷

The Commission may not blind itself to this evidence. It cannot conclude that switches are not “sensibly duplicable” when 1,300 of them already have been duplicated. It cannot conclude that CLECs are unable to use these switches when they already are doing so to the tune of 23 million residential and business lines. And it cannot conclude that CLECs have been deploying and using their own switches *despite* impairment.

⁴⁰⁵ *Fact Report* at II-1.

⁴⁰⁶ *Id.* at II-1.

⁴⁰⁷ *Id.* at II-1 & Table 3. These statistics are primed to grow even further as new generations and greater numbers of softswitches are deployed. *See id.* at II-3; *cf.* Taqua Comments at 4-6 (discussing cost-effectiveness of softswitches as substitute for Class 5 switches).

In the *NPRM*, the Commission asked for market evidence because such evidence is “more probative than other kinds of evidence.”⁴⁰⁸ The evidence is in, and it confirms what was evident to the Supreme Court in the *Verizon* decision. It proves beyond a shadow of a doubt that CLECs are not impaired without access to circuit switching.

AT&T and other pro-UNE-P CLECs, of course, claim otherwise. Recycling the argument that they peddled three years ago, they claim that they *still* cannot use their switches because of hot cut and collocation problems and the deployment of IDLC. Indeed, they argue, the miniscule carve-out that the Commission established three years ago (which virtually no ILEC has invoked) was too large. Yet these commenters fail to offer anything resembling solid evidentiary support. Such evidence, they claim, is immaterial – *i.e.*, switch counts “mask” impairment,⁴⁰⁹ or are “arbitrary.”⁴¹⁰ The continued pervasive deployment of competitive switches, they argue, “does not prove”⁴¹¹ or “does not support the conclusion”⁴¹² that CLECs are not impaired without unbundled switching. Apparently, these parties would have the Commission believe that, like lemmings marching to the sea, CLECs continue to deploy more and more switches all across the country, despite their inability to use them. This proposition is self-evidently absurd and is belied, in any event, by the fact that CLECs *are* using these switches.

With the hard evidence so solidly against them, the pro-UNE-P CLECs fall back on rhetoric, anecdote, and the same isolated bits of *ad hoc* data that they offered three years ago

⁴⁰⁸ See Notice of Proposed Rulemaking, *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 16 FCC Rcd 22781, 22789-90, ¶ 17 (2001) (“*NPRM*”).

⁴⁰⁹ AT&T Comments at 233

⁴¹⁰ AT&T’s Brenner Decl. ¶ 90 (Attach. A to AT&T Comments).

⁴¹¹ Z-Tel Comments at 48.

⁴¹² *Id.* at 49.

(though some CLEC commenters fail even to provide that⁴¹³). These substitutes for real evidence were not, SBC believes, compelling three years ago. They are even less so now. Before addressing their merits, however, SBC notes that, despite AT&T's claim that its comments reflect "[t]he experience of CLECs generally,"⁴¹⁴ the fact is that they do not. Many CLECs not only remain silent on the subject (thus tacitly admitting that they are not impaired without unbundled switching),⁴¹⁵ but have in the past actively opposed unbundled switching.⁴¹⁶

Choice One, to name but one of many examples, has used and continues to use its own switches in conjunction with loops leased from Ameritech to provide service to customers. Choice One says "it can compete and co-exist with SBC Ameritech."⁴¹⁷ Moreover, Choice One has "no complaints about Ameritech"⁴¹⁸ or its provisioning of loops, and filed no comments in this proceeding. Choice One's story can be told of numerous other CLECs, all successfully using their own switches and offering consumers real competition, real cost savings, and real choice. And if these CLECs can compete with alternative switching facilities, there is no reason to think others cannot as well.

⁴¹³ CompTel, which advertises itself as the "premier industry association representing competitive telecommunications providers of all types," including the most ardent pro-UNE-P CLECs, CompTel Comments at 1, should be in a position to provide the Commission at least some information on the state of competitive facilities deployment. Yet CompTel's comments provide virtually no information that the Commission can use to evaluate the competitive landscape.

⁴¹⁴ AT&T Comments at 217.

⁴¹⁵ See Comments of NuVox Inc., KMC Telecom, Inc., e.spire Communications, Inc., TDS Metrocom, Inc., Metromedia Fiber Network Services, Inc., and SNIPLINK, LLC; Comments of Allegiance Telecom, Inc.; Comments of Sprint Corp.; Comments of Conversent Communications, LLC; Comments of El Paso Networks, LLC, CTC Communications Corp., and Con Edison Communications, LLC; Comments of OpenBand of Virginia, LLC. Despite a combined 320 pages of comments, none of these facilities-based CLECs even addresses unbundled switching, much less suggests that it is impaired without access to unbundled switching.

⁴¹⁶ See, e.g., Letter from Kevin Joseph, Vice President - Government Affairs, Allegiance Telecom, *et al.*, to Magalie Roman Salas, Secretary, FCC, at 2, CC Docket No. 96-98 (FCC filed Oct. 25, 2000) ("[T]he evidence submitted in this proceeding since the *UNE Remand Order* was released confirms that competition is thriving in markets where the requirement to provide unbundled switching has been removed."). See generally *Fact Report* at V-2 & Table 1 (collecting sources).

⁴¹⁷ Ken Stammen, *Choice One Builds from Ground Up*, The Columbus Dispatch, July 6, 2002, at 1B.

⁴¹⁸ Gargi Chakrabarty, *Small Telecom Makes Inroads*, Indianapolis Star, Apr. 19, 2002.

The pro-UNE-P CLECs dispute this claim principally on the basis of collateral concerns – including hot cut and collocation issues – that in their view render competitive switches impractical in most circumstances. As explained above, however, even if these concerns were valid – and, as we discuss below, they are not – they cannot be used to bootstrap unbundled switching onto the Commission’s UNE list. As an initial matter, the existence of some cost or service quality issue associated with self-provisioning an element does not, alone, prove that a CLEC is impaired by not being able to obtain that element from an ILEC as a UNE. Both the Supreme Court and the D.C. Circuit have emphatically rejected such an open-ended view of the Act.⁴¹⁹ Impairment must be based on “characteristics that would make genuinely competitive provision of an element’s function wasteful,” and, without a link to natural monopoly characteristics, “there is no particular reason to think that the element is one for which multiple, competitive supply is unsuitable.”⁴²⁰

Thus, even assuming *arguendo* there are certain cost or service quality issues associated with self-provisioned competitive circuit switching, the question that must be addressed is whether those issues rise to the level at which they render competitive switching wasteful and thus unsuitable for competitive supply. None of the CLECs provides facts remotely sufficient to meet this standard.⁴²¹ Instead, they offer their same old pre-Supreme Court assertions that any

⁴¹⁹ See *Iowa Utils. Bd.*, 525 U.S. at 389-90 (an “assumption that *any* increase in cost (or decrease in quality) imposed by a denial of a network element renders access to that element ‘necessary,’ and causes the failure to provide that element to ‘impair’ the entrant’s ability to furnish its desired services, is simply not in accord with the ordinary and fair meaning of those terms”); see also *id.* at 392 (giving substance to the “necessary” and “impair” requirements is not achieved by “regarding *any* ‘increased cost or decreased service quality’ as establishing a ‘necessity’ and an ‘impair[ment]’ of the ability to ‘provide . . . services’”) (alterations in original); *USTA*, 290 F.3d at 426, 427 (an “open-ended notion of what kinds of cost disparity are relevant” is impermissible; “[t]o rely on cost disparities that are universal as between new entrants and incumbents in *any* industry is to invoke a concept too broad, even in support of an *initial* mandate, to be reasonably linked to the purpose of the Act’s unbundling provisions”).

⁴²⁰ *USTA*, 290 F.3d at 427.

⁴²¹ AT&T suggests that impairment may be discerned from the under-utilization of AT&T’s switches. AT&T Comments at 217. AT&T, however, never actually proves that its switches are under-utilized. First, the 3-percent figure on page 217 of its comments and paragraphs 23 and 38 of Ms. Brenner’s declaration is highly

increased cost and any decreased service quality proves that they are impaired. Those days are over. Impairment means more than a bare bones assertion of increased cost or decreased service quality.

Moreover, as Chairman Powell said three years ago, if there are problems with hot cuts or collocation “that do not result directly from denying CLECs access to UNEs,” the Commission should address those problems head-on and not import them into the UNE analysis.⁴²² Commissioner Abernathy recently echoed this sentiment, observing that “consumers are usually better served if regulators shift their emphasis from imposing prescriptive rules – which by their very nature are inflexible and overbroad, and therefore tend to hamper innovation – to relying on a regime with fewer rules and a greater emphasis on enforcement mechanisms.”⁴²³ Unbundling circuit switching simply because some carriers in some instances may not perform hot cuts in an optimal manner would be an irresponsible cure for an alleged – but unproven – problem that could be addressed directly.

AT&T’s lawyers have read these admonitions too, of course, and they’ve seen the writing on the wall. Consequently, AT&T now attempts to bulletproof its hot cuts claim by arguing, in essence, that the hot cut process is “inherently” incompatible with mass-market competition.⁴²⁴ To ensure the continued availability of the UNE-P *ad infinitum*, it proposes an electronic loop

misleading. That figure simply shows that AT&T has ordered more UNE-P lines than UNE-L lines. It has nothing whatsoever to do with the utilization of its switches. Second, the utilization percentages in AT&T’s Leshner-Frontera declaration demonstrate only that AT&T’s switches are not being used to capacity, not that they are under-utilized. There are a host of reasons for the utilization rates of AT&T’s switches, not the least of which is the fact that switches have large capacities and it takes some time to grow sufficient volumes and approach the limits of their capacities. AT&T also could have underestimated demand. Whatever factors are driving AT&T’s utilization rates, there is no evidence that they are in any way the result of hot cuts – or any other factor – such that the Commission may look to utilization rates as an indicia of impairment. Finally, AT&T’s assertion that its switches are under-utilized is difficult to square with its continued switch deployment after it made the very same hot cut claims in 1999.

⁴²² *UNE Remand Order*, Statement of Commissioner Michael K. Powell, Dissenting in Part, at 4.

⁴²³ Abernathy, *My View from the Doorstep of FCC Change*, 54 Fed. Comm. L.J. at 204.

⁴²⁴ AT&T Comments at 214.

provisioning “fix” – an entirely implausible one that could require ILECs to spend *billions* of dollars and take years to implement.

The Commission should not be beguiled by this ploy. The actual evidence shows that SBC and other ILECs are providing hot cuts in a timely and reliable manner – a manner, the Commission has concluded on more than a dozen occasions, that gives CLECs a meaningful opportunity to compete using their own switches and unbundled loops. It shows, further, that ILECs can provision hot cuts in any quantities that reasonably could be required. It also puts to rest CLEC claims with respect to collocation and IDLC loops and shows, beyond a shadow of a doubt, that CLECs are not impaired without access to circuit switching.

1. Hot Cuts Do Not Impair Competitive Switching.

AT&T states point-blank that “it is patently unreasonable to expect that *any CLECs* would enter the market or otherwise deploy additional facilities if it could only use hot cuts to access customer loops,”⁴²⁵ and that “general facilities-based entry into the mass market is *simply impossible* as long as the incumbents rely on manual processes to provide competitors with access to their customers’ loops.”⁴²⁶ To support these assertions, AT&T relies upon the Commission’s *UNE Remand Order*, *New York 271 Order*,⁴²⁷ and *Michigan 271 Order*.⁴²⁸ The fact that AT&T relies on Commission 271 orders from three and five years ago and the three-year-old *UNE Remand Order* as factual support for its claim should itself be an indication of the

⁴²⁵ AT&T Comments at 217 (emphasis added).

⁴²⁶ *Id.* at 206 (emphasis added). Similarly, Ms. Brenner’s declaration asserts that “[n]o matter how much switching capacity a new entrant owns, it still needs UNE-P so that it can reliably obtain reasonable volumes of customers before it connects them to those switches.” AT&T’s Brenner Decl. ¶ 55.

⁴²⁷ Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953 (1999), *aff’d*, *AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000).

⁴²⁸ Memorandum Opinion and Order, *Application by Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan*, 12 FCC Rcd 20543 (1997).

merits of its arguments. In each and every one of the 11 section 271 orders (approving 14 states) since New York, the Commission has found that the RBOCs provide hot cuts in sufficient quantity, with sufficient speed, and of sufficient quality, to allow CLECs a meaningful opportunity to compete.⁴²⁹

Thus, for example, the Commission found in its *Texas 271 Order* “that SWBT demonstrates that its provisions [coordinated hot cuts] at a level of quality that offers efficient competitors a meaningful opportunity to compete.”⁴³⁰ Included in the analysis leading to that conclusion was a review of hot cut performance data with respect to installation quality – specifically, the outage rate associated with failed hot cuts, and the trouble rate following hot cut installation (all of which, coincidentally, are issues raised by AT&T in its comments as sources

⁴²⁹ See Memorandum Opinion and Order, *Application by SBC Communications Inc., et al., Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas*, 15 FCC Rcd 18354, 18484, ¶ 256 (2000) (“*Texas 271 Order*”); Memorandum Opinion and Order, *Joint Application by SBC Communications Inc., et al., for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, 16 FCC Rcd 6237, 6337, ¶ 201 (2001) (“*Kansas/Oklahoma 271 Order*”), *aff’d in part and remanded*, *Sprint Communications Co. v. FCC*, 274 F.3d 549 (D.C. Cir. 2001); Memorandum Opinion and Order, *Application by Verizon New England Inc., et al., For Authorization to Provide In-Region, InterLATA Services in Massachusetts*, 16 FCC Rcd 8988, 9077, ¶ 159 (2001), *appeal pending*, *WorldCom, Inc. v. FCC*, No. 01-1198 (and consolidated cases) (D.C. Cir.); Memorandum Opinion and Order, *Application by Verizon New York Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Connecticut*, 16 FCC Rcd 14147, 14152-53, ¶¶ 10-13 (2001); Memorandum Opinion and Order, *Application of Verizon Pennsylvania Inc., et al., for Authorization To Provide In-Region, InterLATA Services in Pennsylvania*, 16 FCC Rcd 17419, 17466, ¶ 86 (2001), *appeal pending*, *Z-Tel Communications, Inc. v. FCC*, No. 01-1461 (D.C. Cir.); Memorandum Opinion and Order, *Joint Application by SBC Communications Inc., et al., Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Arkansas and Missouri*, 16 FCC Rcd 20719, 20768, ¶ 102 (2001) (“*Arkansas/Missouri 271 Order*”), *appeal pending*, *AT&T Corp. v. FCC*, No. 01-1511 (D.C. Cir.); Memorandum Opinion and Order, *Application by Verizon New England Inc., et al., for Authorization To Provide In-Region, InterLATA Services in Rhode Island*, 17 FCC Rcd 3300, 3339, ¶ 83 (2002); Memorandum Opinion and Order, *Application by Verizon New England Inc., et al., for Authorization To Provide In-Region, InterLATA Services in Vermont*, 17 FCC Rcd 7625, 7654, ¶ 51 (2002), *appeal pending*, *AT&T Corp. v. FCC*, No. 02-1152 (D.C. Cir.); Memorandum Opinion and Order, *Joint Application by BellSouth Corporation, et al., for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, 17 FCC Rcd 9018, 9145, ¶ 220 (2002) (“*Georgia/Louisiana 271 Order*”); Memorandum Opinion and Order, *Application by Verizon New England Inc., et al., for Authorization to Provide In-Region, InterLATA Services In Maine*, CC Docket No. 02-61, FCC 02-187, ¶ 46 (rel. June 19, 2002); Memorandum Opinion and Order, *Application by Verizon New Jersey Inc., et al., for Authorization To Provide In-Region, InterLATA Services in New Jersey*, WC Docket No. 02-67, FCC 02-189, ¶ 136 (2002).

⁴³⁰ *Texas 271 Order*, 15 FCC Rcd at 18490, ¶ 267 (2000).

of impairment, without a single reference to the multiple instances in which the Commission has considered these very issues).⁴³¹

Specifically, with respect to outages – the very issue that AT&T focuses on here – the Commission found that SWBT’s coordinated hot cut process “minimizes service disruptions that may significantly affect competing carriers’ end-user customers.”⁴³² As a result of its finding, the Commission concluded that “SWBT demonstrates that the level of outages competing carriers may experience as a result of failed SWBT [coordinated hot cuts] is sufficiently small to provide an efficient competitor with a meaningful opportunity to compete.”⁴³³ Indeed, the Commission found the outage rate “low enough” to reject the very argument that AT&T made in that proceeding and repeats in its comments (and has repeated *ad infinitum* in nearly every proceeding in which it participates): that the outage rate makes it difficult for AT&T “to obtain and retain customers.”⁴³⁴

Less than a year after its *Texas 271 Order* the Commission affirmed its conclusions in its *Kansas/Oklahoma 271 Order*. Once again, the Commission found that SWBT provides coordinated hot cuts “in a timely manner, at an acceptable level of quality, with minimal service disruption, and with a minimum number of troubles following installation.”⁴³⁵ Specifically, with respect to quality of service issues, the Commission again found that SWBT “provisions [coordinated hot cuts] at a level of quality that offers efficient competitors a meaningful

⁴³¹ *Id.*; see also *id.* at 18490-93, ¶¶ 268-273 (outages), 18493-94, ¶ 274 (installation troubles).

⁴³² *Id.* at 18490, ¶ 268; see also *id.* at 18491, ¶ 269 (“SWBT’s [coordinated hot cut] process minimizes service disruptions experienced by competing carrier customers who are provisioned service via hot cut loops.”)

⁴³³ *Id.* at 18490, ¶ 268.

⁴³⁴ *Id.* at 18491-92, ¶ 270. SBC offers two hot cut processes, the coordinated hot cut (CHC) process and the frame due time (FDT) process. The Commission’s conclusion was based on the CHC process. The fact that SBC offers FDT as a less costly and less labor-intensive process that CLECs may choose only reinforces the conclusion that SBC provides hot cuts in a manner that allows reasonably efficient CLECs a meaningful opportunity to compete.

⁴³⁵ *Kansas/Oklahoma 271 Order*, 16 FCC Rcd at 6337, ¶ 201.

opportunity to compete.”⁴³⁶ The Commission also rejected the suggestion made by several commenters, as well as by AT&T in this proceeding, that the hot cut process itself is “fundamentally flawed leading to customer outages.”⁴³⁷ In doing so, the Commission warned that “anecdotal evidence” is insufficient to overcome comprehensive performance data in demonstrating that SBC’s hot cut process allows CLECs a meaningful opportunity to compete.⁴³⁸

More recently, in November 2001, the Commission completed its review of the SWBT hot cut process by finding that the processes in Arkansas and Missouri were sufficient to allow reasonably efficient CLECs a meaningful opportunity to compete.⁴³⁹ Because SWBT uses the same hot cut process in all five of its states, it should come as no surprise that, after a thorough Commission review of that process in Texas, Kansas, and Oklahoma, no one provided any comments on the issue for Arkansas and Missouri, and the Commission was able summarily to dispose of the issue in a single paragraph.

The Commission has made similar findings with respect to BellSouth, which “provides hot cuts in Georgia and Louisiana within a reasonable time interval, at an acceptable level of quality, with minimal service disruption, and with a minimum number of troubles following installation.”⁴⁴⁰ And the Commission has said the same thing of Verizon’s processes in eight consecutive orders over the last two and one-half years.⁴⁴¹

⁴³⁶ *Id.* at 6338, ¶ 203.

⁴³⁷ *Id.* at 6340, ¶ 207.

⁴³⁸ *Id.*

⁴³⁹ *Arkansas/Missouri 271 Order*, 16 FCC Rcd at 20768, ¶ 102.

⁴⁴⁰ *Georgia/Louisiana 271 Order*, 17 FCC Rcd at 9145, ¶ 220 (footnote omitted).

⁴⁴¹ *See supra* note 429. Contrary to the implication made by Ms. Brenner, the Commission has not merely found in its 271 orders that the RBOCs provide “minimally acceptable” hot cut performance. AT&T’s Brenner Decl. ¶ 72. That phrase appears nowhere in any hot cut section of any 271 order since New York, and it is highly misleading for AT&T to suggest, through the use of quotation marks, that it does. The standard consistently applied by the Commission is whether an RBOC’s process provides CLECs a meaningful opportunity to compete. *See, e.g., Kansas/Oklahoma 271 Order*, 16 FCC Rcd at 6336, ¶ 199; *Texas 271 Order*, 15 FCC Rcd at 18485, ¶ 258. The “meaningful opportunity to compete” standard is hardly a “minimal” standard.

It would be highly inconsistent for the Commission to have concluded in its section 271 orders that the RBOC hot cut processes provide CLECs a meaningful opportunity to compete, but come to the 180° opposite conclusion in this proceeding that somehow hot cuts impair the ability of CLECs to compete using their own switches.⁴⁴²

Nonetheless, AT&T and the other pro-UNE-P CLECs generally assert that the hot cut process is “inherently unreliable” because of the manual nature of the work involved.⁴⁴³ Aside from the fact that the Commission has already rejected that claim in its section 271 orders, it also is simply not true. The mere fact that hot cuts involve some manual work and some level of coordination does not render them inherently unreliable. On the contrary, SBC has in place well-established, well-documented, and well-tested hot cut processes that allow it efficiently, reliably, and timely to provision unbundled hot cut loops.⁴⁴⁴ The data included with our opening comments, as well as the additional hot cut performance data included in Attachment E to these comments, prove it.⁴⁴⁵

This data should come as no surprise. The work involved in a hot cut – disconnecting and re-connecting jumpers and cross-connects on frames – is work that SBC and every other ILEC has been performing for decades. It is what central office technicians do.⁴⁴⁶ The fact that

⁴⁴² Cf. *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148, 164 (D.C. Cir. 2002) (Commission may not in one proceeding “ignore[] the implications of its findings” in another proceeding).

⁴⁴³ AT&T Comments at 214; WorldCom Comments at 34. AT&T claims that “all voice-grade loops are hard-wired to ILEC facilities” as a result of the “monopoly status” of the ILECs. AT&T Comments at 210. AT&T thus suggests that somehow the ILECs, as a group, conspired to wield their monopoly power to hard-wire their networks over the last several decades (when they were owned by AT&T) in such a way as to frustrate future competitors. The fact is that loops are hard-wired to frames because that is the way to engineer a circuit switch-based telephone network, monopoly or no monopoly. The Commission need look no further for proof of this mild assertion than the network of AT&T and virtually every other CLEC, in which loops are hard-wired to frames in CLEC central offices. The sheer nonsense of AT&T’s invective is indicative of the substantive merits of its hot cuts arguments.

⁴⁴⁴ See Declaration of John Berringer and David R. Smith ¶ 9 (“Berringer/Smith Decl.”) (attached hereto as Attach. B).

⁴⁴⁵ See *Fact Report* App. H, at H-3, H-4; Attach. E.

⁴⁴⁶ *Id.* ¶ 35.

a jumper or cross-connect is wired to a CLEC rather than an ILEC frame in no way alters the fundamental nature of the work. And the fact that manual labor is involved does not, *ipso facto*, render the process inherently unreliable.⁴⁴⁷ There are millions of fully operational cross-connects in SBC's central offices – every one of which was placed by SBC central office technicians in the regular course of their job responsibilities.

AT&T's indictment of manual hot cut processes is also logically contrary to its oft-repeated plea for UNE-P line splitting (*i.e.*, AT&T's Multi-Service Platform offer), which would, of necessity, require UNE-P lines to be hot cut in order to install data splitter.⁴⁴⁸ AT&T refers to its multi-service platform offer as the “most promising facilities-based alternative for residential service today.”⁴⁴⁹ AT&T, however, offers no reconciliation as to how such UNE-P line splitting hot cuts will work, while more traditional UNE loop hot cuts render general facilities-based competition “impossible.”⁴⁵⁰

Faced with the fact that the Commission has repeatedly approved Bell company hot cut performance, AT&T attempts to manufacture evidence to call those approvals into question. AT&T claims, for example, that, on a nationwide basis, customer conversions took an average of 45 days⁴⁵¹ and that service interruptions occurred, on average, 6-9 percent of the time.⁴⁵² But

⁴⁴⁷ *Id.* ¶¶ 18-22.

⁴⁴⁸ See AT&T's Brenner Decl. ¶ 64; CompTel Comments at 46 (“In particular, the ILEC would need to provide a cross-connect between the UNE-L carrier and the data carrier.”).

⁴⁴⁹ AT&T Comments at 229.

⁴⁵⁰ Moreover, the manual labor required for hot cuts is far less cumbersome and complicated than the effort required for cable telephony customers acquired by AT&T. See Letter from Robert W. Quinn, Jr., Director-Federal Government Affairs, AT&T, to Magalie Roman Salas, Secretary, FCC, CS Docket No. 98-178 (FCC filed Nov. 17, 1998). Yet AT&T has never suggested, and presumably its shareholders would be surprised to learn, that such manual processes are “inherently unreliable.” AT&T cannot have it both ways. Either it must rescind its proclamation that it can make a go of cable telephony, or it must admit that the introduction of manual labor does not, by itself, render the hot cut process inherently unreliable.

⁴⁵¹ AT&T's Brenner Decl. ¶¶ 39, 69.

⁴⁵² *Id.* While we know virtually nothing about where these numbers came from, we do know that they are well over one-year old and represent only four months of performance data.

AT&T provides no basis upon which the Commission could rely on these data.⁴⁵³ AT&T provides no clue as to when, where, over what time period, and by what means its data were ostensibly collected. Nor does it reveal the companies who ostensibly were performing these hot cuts, the circumstances in which they took place, or the manner in which the data were aggregated to arrive at the average.⁴⁵⁴

The same lack of transparency also holds true for AT&T's claim that over half of its orders were cancelled prior to conversion.⁴⁵⁵ Indeed, the problem is worse for that claim, because AT&T implies that poor hot cut performance was the cause of such cancellations, but provides no support whatsoever that it even gathered any data examining the root cause of its cancellation rate. AT&T's assertions are, in a nutshell, wholly unverifiable.

There also is no factual support for the assertion made by AT&T and the other pro-UNE-P CLECs that hot cuts cannot be provisioned in sufficient volumes to support competitive switching in the absence of UNE-P.⁴⁵⁶ That assertion is not based on fact, or even projections based on fact. It is pure conjecture. The pro-UNE-P CLECs simply assume that today's hot cut volumes represent the maximum that ILECs can provision. Thus, AT&T says no more than "[n]o incumbent LEC has come even close to 'successfully provision[ing] coordinated loop

⁴⁵³ Z-Tel similarly provides no data at all to support its assertion of "[c]ommon service disruptions" associated with hot cuts. Z-Tel Comments at 45. It is, in any event, ironic that Z-Tel, which owns no switches, and has never ordered a single unbundled loop or hot cut, would nonetheless feel qualified to complain about the hot cut process. The one source Z-Tel relies upon is KMC's complaints about BellSouth's hot cuts in Georgia in Louisiana. *Id.* at 45-46. However, the Commission recently rejected KMC's complaints and concluded that BellSouth's hot cut process provides competitors a meaningful opportunity to compete. *Georgia/Louisiana 271 Order*, 17 FCC Rcd at 9144-45, ¶ 220.

⁴⁵⁴ Indeed, from the paragraphs of Ms. Brenner's declaration preceding the introduction of this statistic, and, in particular ¶¶ 35, 37, and 38, it would appear that the data underlying the statistic come from a limited period of time (1998 through portions of 2001) as well as limited markets (several "key" markets, such as Texas and New York). It appears clear that the data are in no sense comprehensive or representative.

⁴⁵⁵ AT&T's Brenner Decl. ¶ 40.

⁴⁵⁶ AT&T Comments at 215-26; Z-Tel Comments at 39-44; UNE-P Coalition Comments at 47-48.

cutovers in the volumes necessary for [competing] carriers to serve the mass market.”⁴⁵⁷ From that “fact,” and nothing more, AT&T draws the conclusion that “it would be impossible to complete hot cuts in those volumes.”⁴⁵⁸ Similarly, using nothing more than past hot cut volumes – based, it says, on “discussions with Verizon” – and current UNE-P volumes, Z-Tel draws the conclusion that ILECs have “no chance” of handling any increases in hot cut volumes that might be associated with the elimination of unbundled switching.⁴⁵⁹ No CLEC has ever seriously tried to estimate, using actual data, whether ILECs could, in fact, handle increased hot cut volumes associated with the elimination of unbundled switching.

The reason for that omission is obvious. Facts, not conjecture, demonstrate that SBC – and presumably other ILECs – can substantially increase their hot cut volumes. Historic hot cut volumes have been driven by CLEC demand, not by ILEC capacity. Thus, past CLEC hot cut volumes are no barometer as to the limits – in terms of capability or scalability – of an ILEC to perform hot cuts in substantial volumes. And there certainly is nothing about the “very nature” of hot cuts such that they “could never be performed in the volumes needed, and at the performance levels customers require, to support true competition in local business markets.”⁴⁶⁰

On the contrary, SBC has processes in place to ensure that it can adjust its staffing levels for all work groups involved in the hot cut process to absorb any reasonably foreseeable increases in hot cut volumes that might result from the elimination of unbundled switching.⁴⁶¹ SBC regularly adjusts its workforce to accommodate spikes in loop provisioning,⁴⁶² and it can

⁴⁵⁷ AT&T Comments at 216 (quoting *UNE Remand Order*, 15 FCC Rcd at 3820, ¶ 271).

⁴⁵⁸ *Id.*

⁴⁵⁹ Z-Tel Comments at 39-43; *see also* UNE-P Coalition Comments at 47-48.

⁴⁶⁰ AT&T’s Brenner Decl. ¶ 7.

⁴⁶¹ Berringer/Smith Decl. ¶¶ 24-34 (discussing Local Service Center and Local Operations Center scalability); *id.* ¶¶ 35-50 (discussing central office scalability).

⁴⁶² *Id.* ¶¶ 29, 47.

draw upon that experience to satisfy any similar increase in hot cut activity that might result from the elimination of unbundled switching. Indeed, even assuming that every UNE-P unbundled switching order becomes an order for a hot cut loop – which is certainly an aggressive estimate of the likely hot cut volumes if unbundled switching is eliminated – SBC readily can meet projected volumes.

This is not a matter of conjecture or speculation. Using these aggressive volume estimates, and actual data as to workloads, times required to perform hot cut activities, and force capabilities, SBC demonstrates in the attached declaration that it can perform hot cuts in sufficient volumes to continue to provide CLECs meaningful opportunities to compete if unbundled switching is eliminated.⁴⁶³ In the face of these data, the Commission may not simply assume, as the UNE-P forever CLECs ask it to, that this is not so.

AT&T argues further that, the economics of competitive switch deployment aside, the Commission should retain UNE-P in order to allow CLECs to amass sufficient volumes of customers, whose lines can then be cutover to CLECs on a “project” basis.⁴⁶⁴ Rather than disparage the hot cut process, however, AT&T’s argument dispels the notion that hot cuts are “inherently unreliable.” Hot cut “projects” are still hot cuts, but in bigger volumes.⁴⁶⁵ Indeed, the attributes that AT&T ascribes to hot cut “projects” – that they are planned in advance, that they can be performed after business hours, and that they use technicians dedicated to the project⁴⁶⁶ – are not unique to hot cut “projects” at all. Rather, they are attributes of *all* hot cuts.⁴⁶⁷ Thus, if, as AT&T concedes, project-managed hot cuts do not impair CLECs, then hot

⁴⁶³ *Id.* ¶¶ 23-51.

⁴⁶⁴ AT&T Comments at 208; AT&T’s Brenner Decl. ¶¶ 9, 45, 50.

⁴⁶⁵ Berringer/Smith Decl. ¶ 22.

⁴⁶⁶ AT&T Comments at 221.

⁴⁶⁷ Berringer/Smith Decl. ¶ 22.

cuts in general do not either. In other words, AT&T's endorsement of hot cut projects simply proves that SBC and the other ILECs can perform hot cuts in volume and on a reliable basis. Moreover, aside from "confiscator[ily] low" rates, UNE-P provides no particular advantage to the CLEC wishing to amass customer volumes before investing in its own switches. As we have explained above, if CLECs really do require a base of customers in order to justify competitive switch deployment – and, as the marketplace evidence makes clear, they do not – they can simply resell ILEC services.

AT&T and the other pro-UNE-P CLECs also contend, without any evidence at all to support their contention, that the non-recurring charges for hot cuts are "unreasonable."⁴⁶⁸ As an initial matter, however, the proper course for dealing with such allegations is to address those charges directly. Indeed, the Act provides a mechanism through which carriers can challenge rates such as these before state commissions and in federal court.⁴⁶⁹ If commenters truly believed that the rates for hot cuts were "unreasonable," presumably they would have said so in the proper forum. That they by and large have not says much about their real motivation in raising them here.

In any case, SBC's hot cut charges are reasonable and consistent with the cost-based requirements of the Act. Depending on the state and the number of lines included in an individual order, the price of a coordinated hot cut varies from approximately \$15 to approximately \$150. No CLEC has set forth any facts to support their bald assertion that these rates are prohibitive. The fact is that SBC's non-recurring hot cut charges are set at cost, based on the FCC's UNE pricing rules. Such charges fall far short of the standard articulated by the

⁴⁶⁸ AT&T Comments at 216. *See also* Z-Tel Comments at 35-36; UNE-P Coalition Comments at 45.

⁴⁶⁹ *See* 47 U.S.C. § 252(e)(6).

D.C. Circuit for a legitimate finding of impairment.⁴⁷⁰ Indeed, were that not the case, CLECs would not have ordered nearly half a million hot cuts from SBC alone during the past year.

AT&T culminates its barrage on hot cuts with its proposal that the Commission should continue to require unbundled switching until ILECs implement AT&T's electronic loop provisioning ("ELP") scheme.⁴⁷¹ Not only is AT&T's "solution"⁴⁷² one without a problem, its costs would be so astronomical that it fails even the most basic test of reasonableness.

AT&T's ELP proposal calls for nothing less than a fundamental alteration of the basic architecture of every ILEC telephone network in the country. Essentially, AT&T proposes to "packetize" the entire public switched telephone network for both voice and data traffic.⁴⁷³ According to AT&T and Mr. Gerzberg, after that small feat is accomplished, an as-yet undesigned software-defined process would switch customer lines from carrier to carrier, so that AT&T would have complete access to both the high- and low-frequency portions of every packetized line to every customer in the country. In effect, AT&T's proposal would force every ILEC in the country to deploy a broadband network architecture designed by AT&T, in order to provide AT&T and every other CLEC unfettered access to those broadband networks.⁴⁷⁴ The Commission should reject this outlandish idea.

AT&T is incorrect that its ELP proposal could be accomplished with little or no impact to incumbents or consumers. While there may be no need for a "quantum change" in *technology* to

⁴⁷⁰ AT&T also asserts that the recurring charge for unbundled loops are too high. AT&T Comments at 216. AT&T would pay that rate, however, whether it orders a discrete loop (with a hot cut) to combine with its own switch, or that same loop as part of the UNE-P. Its criticism of recurring loop rates is, therefore, totally irrelevant to the question whether it is impaired without access to unbundled switching and the UNE-P.

⁴⁷¹ *Id.* at 235-39.

⁴⁷² *Id.* at 235-37.

⁴⁷³ *Id.* at 237; AT&T's Gerszberg Decl. ¶¶ 7, 22 (Attach. C to AT&T Comments); *see* Declaration of Christopher J. Boyer ¶¶ 10-13 (attached hereto as Attach. C).

⁴⁷⁴ AT&T Comments at 238.

implement ELP,⁴⁷⁵ the overall impact to both carriers and consumers in terms of cost and service would be enormous. AT&T's proposal entails a fundamental change in the manner in which local services are provided and would require a dramatic alteration to the overall architecture of every ILEC local telephone network. AT&T's proposal thus is not, in any sense, "modest."⁴⁷⁶

AT&T's proposal would require substantial modifications to outside plant equipment; it would require substantial modifications to central office equipment; and it would require substantial modifications to operations support systems ("OSS").⁴⁷⁷ In other words, it would require substantial modifications to virtually every part of every local telephone network in the country. In order to implement AT&T's proposal, SBC (and every other ILEC) would have to deploy what Mr. Gerzberg refers to as "true" NGDLC equipment at thousands of remote terminal sites in every single wire center in the country.⁴⁷⁸ SBC (and every other ILEC) would have to deploy "voice gateways" in every single central office.⁴⁷⁹ SBC (and every other ILEC) would have to design and deploy new OSS for its ordering and provisioning systems.⁴⁸⁰ And, of course, SBC (and every other ILEC) would have to install, test, and maintain all that equipment.

All such changes would require enormous capital investment. To illustrate the magnitude of the effort and cost that would be involved, SBC's Project Pronto called for deployment of equipment in select remote terminals in Tier I wire centers, whereas AT&T's ELP scheme would require SBC to deploy equipment in every single remote terminal in every single wire center throughout SBC's serving territories. Using its \$6 billion Project Pronto estimate as a rough

⁴⁷⁵ *Id.* at 237.

⁴⁷⁶ AT&T's Gerszberg Decl. ¶ 7.

⁴⁷⁷ *See generally* Boyer Decl.

⁴⁷⁸ *See id.* ¶ 10.

⁴⁷⁹ *See id.*

⁴⁸⁰ *See id.* ¶ 28.

benchmark, SBC estimates that the “true” NGDLC equipment alone (putting aside the customer premise, OSS, and other equipment) required for AT&T’s ELP scheme could cost SBC (let alone all the other ILECs) \$30 billion or more to deploy.⁴⁸¹

Including the entire cost of all the equipment necessary to implement AT&T’s scheme, and assuming the rough benchmark based on SBC’s Project Pronto would be similar for other ILECs, it could well cost more than \$100 billion to implement ELP nationwide.⁴⁸² Whatever the precise number, the reality is that the total cost of AT&T’s ELP scheme would be staggering. It is no wonder then that AT&T includes no estimate at all of the work required to implement its proposal, its cost, or the time it would take to implement. Even more obvious is the fact that AT&T studiously avoids any discussion of who would pay for its proposal or how. The enormous cost of this proposal – not to mention its administrative complexity – is presumably one of the main reasons that AT&T proposed it as a condition of eliminating unbundled switching and UNE-P.

The other main reason is AT&T’s desire – notwithstanding its status as the leading broadband provider in the country – to get access to ILEC broadband infrastructure. AT&T’s proposal – and, in particular, its reliance on packetized transmission – may represent the eventual natural evolution of the local telecommunications network over the next several decades. The Commission, however, should not pre-ordain that evolution – much less do so for the sole purpose of making it easier for AT&T and others to free-ride on ILEC facilities. At bottom,

⁴⁸¹ See *id.* ¶ 24.

⁴⁸² For perspective, and to highlight the sheer absurdity of what AT&T is proposing, \$100 billion is approximately 20 times the \$4.8 billion fiscal year 2002 budget for the National Science Foundation (*see* <http://www.nsf.gov/od/lpa/news/media/fsnsf.htm>); 38 times the \$2.6 billion fiscal year 2002 budget for the U.S. National Park Service (*see* <http://165.83.219.72/budget2/documents/budget%20history.pdf>); and approximately 1.5, 2, 3, 5, and 12 times the 1998 gross national products of Ireland, Czechoslovakia, Romania, Uruguay, and Bolivia, respectively (*see* <http://www.census.gov/prod/2001pubs/statab/sec30.pdf>). AT&T casually describes such cost as “incremental.” AT&T’s Gerzberg Decl. ¶ 8. Its description is accurate only in the sense of the primary definition of “increment,” which is an increase in number, and certainly not the secondary definition, which is a small increase in quantity. *See Webster’s II New College Dictionary* 562 (1999).

AT&T's proposal is really just another effort by AT&T to gain access to ILEC broadband deployment, while keeping the UNE-P in the process. The Commission should see through AT&T's proposal and reject it out-of-hand.

2. ILEC Digital Loop Carrier Deployment Does Not Impair Competitive Switching.

Several pro-UNE-P CLECs also argue that ILEC deployment of digital loop carrier ("DLC") impairs CLECs in their ability to use competitive switching.⁴⁸³ That claim is technically inaccurate, highly misleading, and factually and legally insufficient to support a finding of impairment.⁴⁸⁴

The sweeping claim that "CLECs seeking access to individual customer loops in order to provide their own switch-based service generally cannot access DLC loops in an economical manner"⁴⁸⁵ is simply not true. It is, first of all, based on a technically inaccurate premise that all Digital Loop Carrier impacts the provision of unbundled loops. There are two forms of DLC – Universal Digital Loop Carrier ("UDLC") and Integrated Digital Loop Carrier ("IDLC"). UDLC lines have appearances on main distribution frames in ILEC central offices, whereas lines served over IDLC do not. Thus, while an IDLC line cannot practically be cut-over to a CLEC on a voice grade level, a UDLC line can. The general assertion that all DLC impacts access to unbundled loops is inaccurate.

AT&T's statistics are therefore highly misleading. AT&T estimates that nearly 15 percent of SBC's lines are provisioned over DLC. This, figure, however, represents total lines provisioned over all forms of DLC, including both IDLC and UDLC. SBC provisions closer to

⁴⁸³ AT&T Comments at 212-14; AT&T's Brenner Decl. ¶¶ 74-77.

⁴⁸⁴ Moreover, any inflammatory suggestion that SBC or any other ILEC deploys DLC to frustrate CLEC switch deployment is nonsense. *See* AT&T's Gerszberg Decl. ¶ 8. ILECs have been deploying DLC systems in their networks for 20 years or more.

⁴⁸⁵ AT&T Comments at 213.

three percent of all of its lines over IDLC. Moreover, many DLC locations have both IDLC and UDLC, and for several years SBC's loop deployment guidelines have required the deployment of at least one UDLC system where IDLC is deployed. Another common method for allowing CLEC access to a line that SBC serves over IDLC is to "roll over" that line to spare copper facilities and then hot cut the line to the CLEC, as with any other copper loop. The availability of UDLC and spare copper lines provide CLECs with alternative facilities for 99.88 percent of all of SBC's lines served over IDLC. Thus, contrary to the misleading numbers presented by AT&T, the potential magnitude of this issue is, at most, miniscule.⁴⁸⁶

Further, even if a customer is currently served over IDLC and there is no UDLC or spare copper alternative, there is no impairment to a CLEC using competitive switching to serve that customer. SBC makes unbundled sub-loops available to CLECs as required by the *Local Competition Order*.⁴⁸⁷ CLECs can access the copper sub-loop portion of an IDLC line at either the remote terminal or the serving area interface. Indeed, the need to provide service to customers currently served over IDLC was a major determinant of the Commission's decision to unbundle sub-loops in the *UNE Remand Order*.⁴⁸⁸ Thus, the Commission specifically ordered sub-loop unbundling, so that CLECs could "reach subscribers served by the incumbent's IDLC

⁴⁸⁶ While these processes may involve some additional manual work on the part of SBC (in addition to the hot cut itself), no CLEC has ever provided any actual evidence (as opposed to speculation) that such manual work required for a small percentage of all lines generally impairs its ability to use unbundled loops in conjunction with competitive switching.

⁴⁸⁷ *Local Competition Order*, 11 FCC Rcd at 15692, ¶ 383. WorldCom initially argued in a white paper that there are several ways to access IDLC lines at the DS0 level at the central office. See *UNE Remand Order*, 15 FCC Rcd at 3793, ¶ 217 n.417. The Commission determined, however, that such means of access are impracticable. *Id.* WorldCom and other CLECs nonetheless use the argument that unbundled loops can be provided even in an all-IDLC architecture, in order to produce lower unbundled loop price outputs from their UNE cost models. See *Georgia/Louisiana 271 Order*, 17 FCC Rcd at 9172-73, ¶¶ 48-50. Thus, when it serves their purposes to do so, CLECs argue that unbundled loops can be provisioned over IDLC, but they abandon that argument when it might hurt their efforts to perpetuate availability of UNE-P.

⁴⁸⁸ *UNE Remand Order*, 15 FCC Rcd at 3793, ¶ 217.

loops.”⁴⁸⁹ As with hot cuts, there is no factual basis for the pro-UNE-P assertion that ILEC DLC deployment impairs competitive switching.

3. The Cost of Switches, Collocation, and Other Miscellaneous Issues Are No Impairment to Competitive Switching.

As they have in the past, CLECs generally argue that the cost of competitive switches impairs their ability to use those switches to provide service.⁴⁹⁰ Other than one anecdote supplied by Z-Tel, however, none of the CLECs provides any evidence whatsoever as to the cost of competitive switching, let alone any proof that such cost impairs their ability to use competitive switches. This omission is telling. The cost of a switch is no barrier to competitive switch deployment, and the empirical evidence set out at the beginning of this section proves it.⁴⁹¹

Moreover, neither the Act, the Supreme Court, the D.C. Circuit, nor the Commission has ever said that CLECs are impaired in their ability to self-provision an element simply because there is *some* cost in doing so. It is a false premise to suggest that CLECs have some entitlement to enter the market without cost, or at less cost than an incumbent, and it would be bad economics to propose such an entitlement.

The D.C. Circuit specifically said that the Act’s impairment standard requires more than a recitation of costs that are “universal as between new entrants and incumbents in any industry.”⁴⁹² Rather, impairment must be based on cost “characteristics that would make genuinely competitive provision of an element’s function wasteful.”⁴⁹³ None of the costs associated with competitive switching rises to that level. All the switching costs posited by the

⁴⁸⁹ *Id.*

⁴⁹⁰ See Z-Tel Comments at 34-37; WorldCom Comments at 34-35.

⁴⁹¹ See *supra* pp. 112-14.

⁴⁹² *USTA*, 290 F.3d at 427.

⁴⁹³ *Id.*

CLECs – every single one – are the sort of costs that would be faced by a new entrant in any industry. Indeed, they are no more, and quite often less, than the costs faced everyday by incumbents. Such costs are insufficient to prove impairment. In any event, CLECs would not have deployed 1300 switches if the costs of doing so were prohibitive.

AT&T also contends that the cost and provisioning intervals associated with collocation impair its ability to use competitive switches.⁴⁹⁴ AT&T, however, provides no data whatsoever to support its claim. Instead, it simply refers to the *UNE Remand Order* and parrots a single, dubious anecdote offered in comments filed more than three years ago in the *UNE Remand* proceeding that collocation space in a central office can run as high as \$500,000.⁴⁹⁵ That this is the best AT&T is able or willing to offer is itself telling. AT&T and its affiliates have obtained collocation space in over 1,000 central offices throughout the country,⁴⁹⁶ and it surely has information as to what it paid for that space. But, instead of offering that empirical data to the Commission, AT&T serves up a single anecdote, submitted by one CLEC for space in one central office allegedly purchased several years ago.

Wholly apart from the fact that the Commission has concluded that SWBT provides collocation at just and reasonable rates, as required by sections 251(c)(2), 251(d)(2), and 271 of the Act,⁴⁹⁷ there is a short answer to AT&T's claim. As of year-end 2001, CLECs had

⁴⁹⁴ AT&T Comments at 211.

⁴⁹⁵ *Id.*; AT&T's Brenner Decl. ¶ 63. AT&T presents even less evidence – none whatsoever – for its assertion of “delays associated with collocation.” AT&T Comments at 211-12.

⁴⁹⁶ *Id.* at 211.

⁴⁹⁷ See *Texas 271 Order*, 15 FCC Rcd at 18392, ¶ 82; *Kansas/Oklahoma 271 Order*, 16 FCC Rcd at 6359, ¶ 237; *Arkansas/Missouri 271 Order*, 16 FCC Rcd at 20765, ¶ 95. The Commission also found in each of its 271 orders that SWBT's collocation provisioning – including its provisioning performance as to collocation intervals – complies with the Act. SBC's collocation intervals are set forth in its collocation tariffs (some CLECs may have different intervals in their interconnection agreements). For caged physical collocation, those tariffed intervals range from 90 days (for conditioned/active space in Nevada, SWBT states, SNET, and Michigan) to 150 days (in California, for unconditioned/inactive space). For physical cageless collocation, the intervals range from 55 days (in SWBT states, SNET, and Michigan for conditioned/active space in which a CLEC installs its own bays) to 110 days (in California for conditioned/active space). The performance incentive plans applicable in many of these states cover collocation intervals, and thereby provide an additional incentive to meet them.

purchased almost 25,000 collocation arrangements.⁴⁹⁸ That would not be the case if the collocation process, or its cost, were a source of impairment. Indeed, since 1998, the number of CLEC collocation arrangements has increased nearly 480 percent.⁴⁹⁹ The total number of collocation arrangements is now large enough that end offices serving more than 80 percent of all BOC access lines (and nearly 79 percent of all residential lines) have one or more CLEC collocators.⁵⁰⁰

Moreover, such figures do not include CLEC purchases of alternative arrangements to traditional collocation in ILEC central offices. These alternatives (sometimes referred to as “collocation hotels”) allow CLECs to bypass central office collocation while still providing interconnection with ILECs, CLECs, and IXCs.⁵⁰¹ There are alternative collocation providers today in virtually every metropolitan area in the country.⁵⁰² The widespread availability and continued purchase of collocation refutes any suggestion that CLECs are impaired in obtaining collocation to support competitive switch deployment.

In an *ex parte* filed on June 28, 2002, Lightship also raises certain collocation issues.⁵⁰³ Unlike AT&T, however, Lightship does not contend that the costs of collocation necessarily impair CLECs in their ability to use their own switches. It concedes that, as a general matter, that is untrue. It claims, instead, that, only in offices in which there is not a sufficient density of access lines, the costs of collocation impair CLECs’ ability to use their own switches.

⁴⁹⁸ *Fact Report* at II-16.

⁴⁹⁹ *Id.* at I-4.

⁵⁰⁰ *Id.* at II-16.

⁵⁰¹ *Id.*

⁵⁰² *Id.*

⁵⁰³ Letter from Russell M. Blau, Swidler Berlin Shereff Friedman, LLP, to Marlene H. Dortch, Secretary, FCC, Attach. at 2 (FCC filed June 28, 2002).

As an initial matter, Lightship provides no data upon which the Commission could evaluate the merits of its claim. It proposes a test that assumes that it *is* cost-effective for a CLEC to collocate in a central office if it can serve 500 lines in that office, but it offers the Commission no basis for evaluating whether a better test might be 50 lines, 100 lines, or 200 lines.

In any event, in suggesting that collocation is necessary in even the lowest-density central offices, Lightship ignores the other options that are available to CLECs to use their own switches to serve customers in these wire centers. For example, CLECs can use ILEC or CLEC special access services or, if available, UNE loop/transport combinations to haul traffic from these offices to switches or collocation spaces in higher-density offices.⁵⁰⁴ CLECs can thus avoid the need for collocation in the lowest-density offices. Lightship in no way shows that these options are inadequate. CLECs also may rely on resale to serve customers in the lowest-density wire centers.

Based on this ostensible need for collocation in even the lowest-density wire centers, Lightship proposes that the Commission permit ILECs to withdraw local switching from a requesting carrier in a particular central office a certain number of months after that carrier reaches a threshold line count, such as 500 access lines, in that office. There are two fundamental problems with this proposal. First, it is CLEC-centric, not competition-centric. It is designed to promote the interests of individual CLECs, not competition. Long after vigorous competition has developed in a particular central office, a CLEC without 500 access lines would be entitled to use the UNE-P. As noted, however, the D.C. Circuit has made clear that the

⁵⁰⁴ AT&T appears to accept the fact that CLECs can use loop-transport combinations to serve lower-density wire centers with switches that it deploys in higher-density wire centers and thus “avoid collocation costs,” but it suggests that “existing rules effectively preclude CLECs from obtaining EELs.” AT&T Comments at 211. Presumably, AT&T is referring to the local use requirements for EELs, but it never demonstrates how it is precluded by those rules from using EELs. To the contrary, those rules are necessary to ensure that CLECs use loop-transport combinations to provide local service instead of merely to substitute for ILEC services. *See infra* pp. 157-63.

Commission may not “inflict on the economy” the costs of unbundling when it has “no reason to think doing so would bring on a significant enhancement of competition.”⁵⁰⁵ Second, the test is not even tailored to address the issue of low-density wire centers complained of by Lightship. Under Lightship’s test, a CLEC could continue to purchase unbundled switching – and thus the UNE-P – in the densest offices in downtown Chicago, Houston, and San Francisco, as long as it never reaches the 500-line threshold in any of those central offices.

AT&T suggests that CLECs are impaired in using competitive switching because of the cost of “backhauling” traffic to their switches.⁵⁰⁶ The need to backhaul traffic, however, is purely a function of a CLEC’s ability and decision to deploy fewer switches with broader geographic scopes and to use more transport to serve those fewer switches.⁵⁰⁷ In other words, it represents the current relative cost calculus with respect to transport and switching. CLECs *could* deploy more switches, coincident with every ILEC switch, and thus eliminate or substantially reduce the need for backhaul facilities. For logical cost reasons, the CLECs, as is their prerogative, choose not to do so. That decision to reduce switching costs, in favor of transport, and the resulting overall net reduction in CLEC network costs, should not then be used to prove that CLECs are impaired in their ability to use competitive switching.

Finally, several pro-UNE-P CLECs complain that, despite evidence of competitive switch deployment, the economics of the mass market impair their ability to use competitive switching

⁵⁰⁵ *USTA*, 290 F.3d at 429.

⁵⁰⁶ AT&T Comments at 212; AT&T’s Brenner Decl. ¶¶ 6, 79-80; *see also* UNE-P Coalition Comments at 45.

⁵⁰⁷ *See* SBC Comments at 68-69; *see also* AT&T Comments at 203. AT&T also complains that without loop-transport UNE combinations it cannot take advantage of these efficiencies. That is simply not true. It may be correct that a loop-transport combination is an important consideration in achieving the efficiencies associated with deploying fewer switches. Such efficiencies, however, are achieved whether or not the combination is comprised of UNEs, *i.e.*, an EEL vs. special access. Whether as special access or EELs, ILECs provide loop-transport combinations to CLECs.

to serve that market in particular.⁵⁰⁸ Upon closer inspection, however, it is clear that these complaints are not about competitive switching; they are about retail rates. Indeed, AT&T refers to this problem as one of “thin margins.”⁵⁰⁹ This argument falls squarely within the sort rightly rejected by the D.C. Circuit as failing to reflect any criteria by which “unbundling can be said to impair competition in such markets, where, given the ILECs’ regulatory hobbling, any competition will be wholly artificial,” and reflecting a view of impairment which no one has ever explained “makes sense.”⁵¹⁰

It may be the case that, because of below-cost retail rates and higher margins for business customers, many competitive switches are being used today to serve business customers. However, there are at least some CLECs that use their own switches to serve residential customers.⁵¹¹ More generally, there is no fundamental reason that CLECs are impaired in using competitive switches to serve residential (or “mass market”) customers. There is no reason that CLECs cannot use the very same switches that they use to serve larger business customers to also serve the “mass market.” A switch port is a switch port, and a switch minute of use is a switch minute of use, whether that port or minute of use provides service to a residential, small business, or large business customer.⁵¹² The fact that certain CLECs are using competitive switches to serve large business customers does not mean that they, or any other CLEC, cannot use competitive switches to serve mass-market customers.⁵¹³

⁵⁰⁸ Z-Tel Comments at 50-58; AT&T Comments at 218; WorldCom Comments at 86-87.

⁵⁰⁹ AT&T Comments at 205.

⁵¹⁰ *USTA*, 290 F.3d at 422, 423.

⁵¹¹ *Fact Report* at Table II-8.

⁵¹² It is curious that AT&T would simultaneously complain that its switches are not used to capacity and that it prefers to use its own switches, and yet has not migrated a single one of its million-plus residential customers to its own switches. See *Fact Report* at II-17-18. The reason, of course, is that there is no reason to, as long as states continue to drive down UNE-P rates.

⁵¹³ AT&T and WorldCom suggest that the Commission should adjust its switching carve-out to apply only to locations that CLECs are reasonably able to serve with a DS-1 or higher capacity loop. AT&T Comments at 206,

Thus, when AT&T complains of the UNE-P rates in New York, Texas, and elsewhere as unable to support residential competition, its complaint is not really directed to UNEs or UNE rates.⁵¹⁴ Rather, AT&T's real complaint is that residential retail rates do not allow sufficient margins against cost-based UNE rates.⁵¹⁵ The solution to AT&T's complaint, however, is not to continue to unbundle switching for the sake of the UNE-P – and thereby to perpetuate the current death-spiral of reducing UNE rates further and further so as to create artificial margins which CLECs may leverage to their advantage. Rather, as Chairman Powell has suggested, the solution is for the states to fulfill their obligation to rebalance retail rates.⁵¹⁶

B. Routing Tables.

Although several commenters in this proceeding ask the Commission to retain its existing list of unbundled elements, none of them specifically discusses routing tables. That is not surprising, as little can be said in defense of the unbundling of routing tables.

As SBC pointed out in its initial comments, routing tables do not satisfy the heightened “necessary” standard of section 251(d)(2).⁵¹⁷ The “ordinary and fair meaning” of “necessary,”

232-33; WorldCom Comments at 91-92. Their proposal, in effect, eliminates the carve-out, because there are very few switched DS-1 lines. As justification, AT&T posits the inflated claim that the carve-out has been “exceedingly difficult to apply.” AT&T Comments at 206. It is hard to imagine, however, how the carve-out could be exceedingly difficult to apply when it has been invoked in only a few of MSAs. Similarly, AT&T's claim that the carve-out “has led to tedious disputes” and has been manipulated by the ILECs is rank hyperbole. AT&T Comments at 232-33. As support, AT&T refers only to two section 252 arbitrations in Florida and Georgia, in which AT&T took unreasonable interpretations of the phrase “end-users with four or more voice grade (DS0) equivalents or lines” in 47 C.F.R. § 51.319(c)(1)(B)(i), and in which both the Florida and Georgia Public Service Commissions ruled against AT&T. It is clear that the true motivation underlying AT&T's proposal to increase the carve-out is the same old complaint of thin margins for competitive switching as compared to UNE-P. This is most evident in AT&T's fallback position that the Commission increase the carve-out to 18-20 lines as a “proxy” for DS-1 line counts – *i.e.*, increase the number of UNE-P lines permissible under the carve out. AT&T Comments at 233.

⁵¹⁴ AT&T Comments at 226.

⁵¹⁵ AT&T says it will provide residential service “[i]f those states establish reasonable UNE rates that provide CLECs the margins necessary to provide UNE-P-based service.” *Id.* Of course, the margins to which AT&T refers are simply the difference between the prevailing retail rates and the UNE rates.

⁵¹⁶ *See supra* p. 27.

⁵¹⁷ SBC Comments at 79-80 (pointing out that routing tables are proprietary and therefore subject to the “necessary” standard of section 251(d)(2)).

the D.C. Circuit has stated, is “that which is required to achieve a desired goal.”⁵¹⁸ But any CLEC can create its own routing instructions, which can then be programmed into the switch. Indeed, CLECs have already demonstrated this is possible: each of the 200 CLECs deploying its own switches has created the routing instructions for those switches. Thus, CLECs are more than able to provide local service without access to the proprietary and sensitive information contained in ILEC routing tables.

C. Shared Transport.

If the Commission eliminates switching as a UNE, it will necessarily eliminate shared transport as a UNE because the two are inextricably linked. Even if the Commission retains switching as a UNE, however, it must clarify that shared transport need be made available only to support entry into the *local* services product market, not interexchange product markets such as the intraLATA toll market.⁵¹⁹

The commenters in this proceeding that request shared transport do not – and cannot – refute the market evidence that the intraLATA interexchange market is robustly competitive.⁵²⁰ Indeed, no party even suggests that CLECs are impaired in the intraLATA toll market without access to shared transport. And, for example, although SBC began making intraLATA interexchange facilities available to CLECs in the Ameritech region almost a year ago, CLECs using UNE-P in the Ameritech states utilize those facilities to provide intraLATA toll services for less than 20 percent of their UNE-P customers. Whatever the merits of the claim that shared transport is necessary to enter the local services market, there is simply no basis on which the

⁵¹⁸ *GTE Service Corp. v. FCC*, 205 F.3d 416, 423 (D.C. Cir. 2000).

⁵¹⁹ SBC Comments at 81-84.

⁵²⁰ Indeed, the commenters requesting shared transport as a UNE do not focus at all on using shared transport to enter the intraLATA exchange market. *See, e.g.*, AT&T Comments at 158-61; UNE Platform Coalition Comments at 53-55; Z-Tel Comments at 69-70.

Commission could conclude that carriers are impaired without access to shared transport to serve the intraLATA toll market.

III. HIGH-CAPACITY TRANSPORT AND LOOPS

A. Dedicated Transport.

The Commission has rightly committed to resolving the questions raised in this proceeding on the basis of “actual marketplace conditions.”⁵²¹ As SBC explained in its opening comments, those “conditions” make indisputably clear that CLECs are not impaired without access to high-capacity transport. The CLEC commenters, by contrast, virtually ignore the abundant evidence of alternative facilities, and fall back on vague and conclusory assertions related to ILEC size advantages and the purported difficulty of relying upon alternative facilities. Those assertions – which are offered in the teeth of evidence that shows that CLECs can and do rely on competitive transport on a widespread basis – fall well short of establishing impairment.

Competitive Facilities. SBC’s opening comments demonstrated the wealth of competitive high-capacity transport facilities that are available to CLECs. All but nine of the top 100 MSAs are served by at least three CLEC fiber networks.⁵²² By the end of last year, one or more CLECs had obtained fiber-based collocation in Bell company wire centers containing 54 percent of the business lines and 44 percent of all access lines – and a significant portion of those wire centers are served by multiple CLECs.⁵²³ The numbers are even higher in metropolitan areas.⁵²⁴

Indeed, notwithstanding its conclusory claims regarding the need to rely on ILEC fiber, AT&T’s own submissions establish that alternative fiber facilities are widely available. By its

⁵²¹ *NPRM*, 16 FCC Rcd at 22789-90, ¶ 17.

⁵²² *Fact Report* at III-7.

⁵²³ *Id.* at III-2.

⁵²⁴ *Id.*

own account, almost [proprietary begin] XX percent [proprietary end] of AT&T's DS-1 tails are self-provided or provided by third parties.⁵²⁵ Even at the DS-0 level, almost [proprietary begin] XX percent [proprietary end] of AT&T's tails are being self-provided or by third parties.⁵²⁶ And at the DS-3 level, AT&T self-provides backbone transport a full [proprietary begin] XX percent [proprietary end] of the time and tails a whopping [proprietary begin] XX percent [proprietary end].⁵²⁷ ILECs provide a mere [proprietary begin] XX percent [proprietary end] of AT&T's DS-3 tails,⁵²⁸ demonstrating that [proprietary begin] XX percent [proprietary end] of AT&T's DS-3 facilities are obtained from non-ILEC sources.

Moreover, it appears that, if anything, SBC's initial comments *understated* the availability of competitive transport. SBC's opening comments estimated that competitive carriers had deployed at least 184,000 fiber route miles.⁵²⁹ According to ALTS, the actual number is 339,501.⁵³⁰ That figure is comparable to the total fiber transport miles that AT&T attributes to ILECs nationwide.⁵³¹ According to the CLECs, then, there is almost as much competitive fiber as there is ILEC fiber. It is impossible to say that CLECs are impaired without access to the facilities that make up a mere half of the network facilities deployed nationwide.

That is especially so where, contrary to the conclusory claims of several commenters,⁵³² the competitive facilities are so readily available to CLECs. SBC's opening comments demonstrated the existence of a vibrant wholesale fiber market,⁵³³ and additional evidence shows

⁵²⁵ AT&T Confidential Comments at 150 n.110.

⁵²⁶ *Id.*

⁵²⁷ *Id.* at 150 n.109.

⁵²⁸ *Id.* at 150 n.110.

⁵²⁹ SBC Comments at 85.

⁵³⁰ 2002 *Local Competition Report* at 17.

⁵³¹ See AT&T Comments at 123 (estimating ILEC fiber transport networks at 362,000 miles).

⁵³² E.g., Eschelon Comments at 24-26; WorldCom Comments at 76-78; ALTS Comments at 64-67.

⁵³³ *Fact Report* at III-8 to III-10.

the extent to which this market provides real alternatives. Thus, for example, Fiberloops – an on-line fiber clearinghouse referenced in the *Fact Report*⁵³⁴ – lists competitive fiber covering 175 cities nationwide, with over 250,000 miles of long-haul fiber and 34,000 miles of local fiber.⁵³⁵ Fiberloops also lists fiber hotels, at which CLECs can connect with competitive facilities, and it is developing a directory of companies with metropolitan area networks that already identifies “2,000 local networks from 100+ companies.”⁵³⁶ Likewise, American Fiber Systems (AFS) “design[s], build[s], lease[s], and maintain[s] high-capacity, high-bandwidth dark fiber-optic networks” in second and third tier cities across the country.⁵³⁷ It touts itself as providing a turnkey fiber solution for *all* carriers – ILECs, CLECs, ISPs, ASPs, wireless and cable providers, and utilities – by handling “every aspect of the process – route development and design, right-of-way procurement, engineering, franchising, permitting, construction, oversight, operation, monitoring and maintenance.”⁵³⁸

AFS also provides a direct rebuttal to those CLECs that claim, counterfactually, that competitive facilities cannot be extended to new premises,⁵³⁹ or that CLECs are impaired without access to a single ubiquitous fiber network.⁵⁴⁰ AFS explains that “off-net buildings” – *i.e.*, locations that are not even “a planned component of the AFS ring” – “*may be easily connected at a convenient cost per linear foot for all required laterals*. At any point, AFS will discuss with

⁵³⁴ See *id.* at V-9.

⁵³⁵ Fiberloops, *Find Fiber and Facilities Fast*, at <http://www.fiberloops.com/Fiberloops/index.html>.

⁵³⁶ Fiberloops, *Directories*, at <http://www.fiberloops.com/Fiberloops/directory.htm>.

⁵³⁷ American Fiber Systems, *What We Do*, at http://www.americanfibersystems.com/html/what/what_main.html.

⁵³⁸ American Fiber Systems, *The Benefits of Dealing with AFS*, at http://www.americanfibersystems.com/html/what/what_benefits.html.

⁵³⁹ See AT&T Comments at 125-40; WorldCom Comments at 76-78; Eschelon Comments at 12-13; NewSouth Comments at 8-9.

⁵⁴⁰ See AT&T Comments at 148-49; Covad Comments at 67-73; NuVox, *et al.* Comments at 31; Dobson Comments at 8-9.

customers whether an off-net building should become an on-net building.”⁵⁴¹ Moreover, AFS has, like others, “formed relationships with other providers across the nation to supplement [its] solutions with regional, long-haul and metro connectivity.”⁵⁴²

It is accordingly beside the point that CLECs cannot match the “massive scale of the ILECs’ networks.”⁵⁴³ CLECs do not need to. Rather, they seek to obtain transport on specific point-to-point routes in specific markets with specific geographic and customer characteristics. Thus, the question is not whether one particular CLEC can immediately deploy its own transport everywhere; it is instead whether CLECs have competitive alternatives anywhere. Where they do – *i.e.*, where competitive facilities are in the ground, or where the market characteristics match those where such facilities abound – CLECs cannot be said to be impaired without access to ILEC facilities.

In this respect, it is important to understand that, contrary to the assertion of AT&T and others,⁵⁴⁴ CLECs do not approach market entry by entering everywhere at once. Rather, as we have already explained, CLECs (at least the successful ones) have pursued targeted entry strategies, targeting the most lucrative customers in discrete geographic markets first, and gradually extending their networks and operations outward. Moreover, within the areas they choose to serve, CLECs do not need transport connecting every ILEC wire center to every other wire center. ILECs themselves do not connect every wire center directly to every other wire center. Rather, they configure their networks using a hub-and-spoke arrangement, connecting wire centers through tandems, with a few direct connections. CLECs use similar arrangements.

⁵⁴¹ American Fiber Systems, *The AFS Freedom IRU Payment Program* (emphasis added), at <http://www.americanfibersystems.com/pdf/FreedomPriceSheet.pdf>.

⁵⁴² American Fiber Systems, *Metro Maps*, at http://www.americanfibersystems.com/html/cityserv/cityserv_main.html.

⁵⁴³ AT&T Comments at 123.

⁵⁴⁴ See AT&T Comments at 148-49; Covad Comments at 67-73; Sprint Comments at 45-46.

The Commission's impairment inquiry therefore should not assume that CLECs require direct connections between every pair of ILEC wire centers. Rather, it must recognize that CLECs have any number of alternatives – including competitive wholesale facilities, self-provided transport, and ILEC services – to provide service between two points, whether directly or through a transport hub.

Commenters' related claims that impairment results from ILECs' so-called "timing" advantage are equally mistaken. The theory here is that customers that want service quickly are likely to sign up with an ILEC because the ILEC has a ubiquitous network.⁵⁴⁵ But, for one thing, bare assertions aside, there is nothing in the record that establishes that the existence of a large network enables ILECs to provide service to *new* premises more quickly than competitive providers. On the contrary, in many circumstances, it is the CLECs – with their smaller, more nimble organizations – that are able to win contracts because of their ability to initiate service quickly. Thus, for example, Time Warner Telecom recently announced to investors that it had won the New York State Unified Court System as a new customer, and that "[its] ability to construct [its] own fiber facilities into their seven location [sic] in four cities within 30 days was key to winning this opportunity."⁵⁴⁶

Moreover, as with their claims regarding ubiquity generally, purported "timing" concerns turn on the theory that, to compete effectively, CLECs must themselves be able "to replicate incumbent fiber transport facilities."⁵⁴⁷ As discussed above, the truth is that CLECs have access to a vibrant wholesale fiber network that is available – today – to meet many of their transport needs. And, to the extent alternative facilities are not already in place in a particular service area,

⁵⁴⁵ WorldCom Comments at 15-19; El Paso, *et al.* Comments at 8-9; UNE Platform Coalition Comments at 52-53.

⁵⁴⁶ Larissa Herda, President and CEO, Time Warner Telecom, Conference Call Announcing Fourth Quarter Results (Feb. 5, 2002).

⁵⁴⁷ AT&T Comments at 135.

resale or ILEC special access services are available to serve as a bridge while alternative sources are being deployed. Thus, in the vast majority of circumstances, CLECs need not “replicate” anything; instead, they need only avail themselves of the facilities available in the marketplace. It is only by “blind[ing]” themselves “to the availability” of these alternative facilities that commenters can claim impairment without access to ILEC high-capacity transport.⁵⁴⁸

Indeed, requiring unbundling in these circumstances is not merely unnecessary, it is counterproductive. The Act is designed to facilitate real competition among “sensibly duplicable” elements.⁵⁴⁹ As the marketplace facts make clear, with the possible exception of switching, interoffice transport is the most “sensibly duplicable” element in the network. Requiring unbundling of that element where it has not yet been deployed competitively would undermine CLEC incentives to roll their own. It would also invite CLEC gamesmanship – *i.e.*, declining to deploy where deployment is feasible to ensure continued access to UNEs. These concerns are particularly cogent in this area, since transport does not provide a means for differentiating service.

Commenters also make much of the claim that, because they cannot match the ILECs’ scale, they face higher unit costs that render them impaired without access to ILEC facilities.⁵⁵⁰ But, as the D.C. Circuit properly explained, *any* new entrant in *any* capital-intensive industry is likely to face fixed costs that the existing players have already incurred.⁵⁵¹ And, as the D.C. Circuit held and Professor Shelanski explains, that says nothing at all about whether competitors

⁵⁴⁸ *Iowa Utils. Bd.*, 525 U.S. at 389.

⁵⁴⁹ *Verizon*, 122 S. Ct. at 1672 n.27; *see USTA*, 290 F.3d at 426.

⁵⁵⁰ Sprint Comments at 45; AT&T Comments at 129; WorldCom Comments at 68.

⁵⁵¹ *USTA*, 290 F.3d at 427 (“To rely on cost disparities that are universal as between new entrants and incumbents in *any* industry is to invoke a concept too broad, even in support of an *initial* mandate, to be reasonably linked to the purpose of the Act’s unbundling provisions.”).

are impaired in any meaningful sense.⁵⁵² Indeed, this claim is particularly misplaced in a discussion of high-capacity transport. As the Commission has recognized, transport is a point-to-point facility.⁵⁵³ It is accordingly efficiently deployed – whether by an ILEC or a CLEC – where there is sufficient volume between the relevant points. The fact that ILECs have deployed transport on *other* point-to-point routes has little if any bearing on whether deployment is viable on the route in question. In any event, the fact that CLECs have deployed as much fiber as they have puts to rest the notion that CLECs must match the ILECs’ scale to deploy competitive fiber.

AT&T nevertheless claims that such deployment is impractical for CLECs because of a “chicken and egg” dilemma: they do not know if there will ever be sufficient demand to justify building transmission capacity until they actually need the capacity.⁵⁵⁴ But what AT&T opportunistically calls “impairment” is in fact simply normal business risk. And, as Professor Shelanski, explains, there are any number of competitors in any number of industries that take such risks every day:

In many industries with high entry costs, competitors build facilities and prepare to compete with established firms well before they have any assurance of attracting a single customer. DBS providers did not sell unbundled cable service to develop brand name and a customer base before launching their satellites and building base stations. PCS providers did not rebrand conventional cellular service before spending hundreds of millions of dollars to set up their networks. Airlines like JetBlue, Southwest, and Alaska all made substantial capital outlays in advance of selling a single ticket. The point is that there is no empirical or theoretical basis for the argument that a new entrant must establish market share in advance of building facilities in order to have incentive to make the investments necessary to enter a market. *Just because CLECs would prefer to build market share in advance of investing in facilities does not mean absent of such a risk-reducing option they would not invest in the capital necessary to compete against the ILECs.*⁵⁵⁵

⁵⁵² See *id.*; Reply Decl. of Howard A. Shelanski ¶¶ 2-4 (“Shelanski Reply Decl.”) (attached hereto as Attach. D).

⁵⁵³ See, e.g., *UNE Remand Order*, 15 FCC Rcd at 3842, ¶ 322.

⁵⁵⁴ AT&T Comments at 126-27.

⁵⁵⁵ Shelanski Reply Decl. ¶ 4 (emphasis added).

What is more, as explained above in regards to the UNE-P, CLECs that seek to build up a customer base without investing in facilities do not need UNEs to do so. Rather, a CLEC can buy capacity from the ILEC as a service or on a resold basis, while it builds a customer base over which to spread the cost of deploying facilities. Unbundling of transmission facilities – at deep, TELRIC-based discounts – would only subvert that process, by discouraging CLECs from moving to their own facilities.

AT&T also argues that CLECs cannot (or will not) deploy their own facilities because of the threat of predatory pricing from ILECs.⁵⁵⁶ It is well-established, however, that such predatory pricing is highly unlikely in any industry,⁵⁵⁷ and that is especially so here. To be successful, a predatory campaign must succeed not only in driving a CLEC out of the market, but also in ensuring that it takes its facilities with it. In the telecommunications industry, where the location of most facilities is fixed, that is virtually impossible. Thus, as AT&T knows quite well (from, among other things, its acquisition of Northpoint's facilities), when a facilities-based CLEC exits the market, it leaves its facilities behind, to be scooped up at fire sale prices. And, even if an ILEC were irrational enough to attempt a predatory pricing campaign in these circumstances, it is inconceivable that regulators would permit an ILEC to lower its prices long enough to drive out competitors and then raise them again to recoup the losses.⁵⁵⁸

Some commenters claim that, with the tightening of the financial markets, competitive carriers will no longer be able to attract the capital necessary to lay new fiber.⁵⁵⁹ Even if that were true, however, it would not change the fact that there is an extraordinary amount of fiber in

⁵⁵⁶ See AT&T Comments at 130-31 (“[a]t any time, the ILEC can . . . drive prices” down to a point that the CLEC could be “driven from the market”).

⁵⁵⁷ See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

⁵⁵⁸ See, e.g., *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 25-26 (1st Cir. 1990) (Breyer, C.J.).

⁵⁵⁹ E.g., AT&T Comments at 149; WorldCom Comments at 34; El Paso, *et al.* Comments at 22-23.

the ground that CLECs can avail themselves of today. And, in any case, it is not true. ALTS recently reported that CLECs continue to aggressively build out their networks, nearly quadrupling their route miles in service between 1997 and 2001.⁵⁶⁰ And, significantly, much of that growth came in 2001, *after* the the technology and telecom bubble burst. During that year, CLECs increased their network route miles in service by more than 20 percent.⁵⁶¹ As ALTS proudly proclaims, “the most remarkable feature of the CLEC industry in 2001 was this – it continued to grow.”⁵⁶² And while “CLEC investment in 2001 could not keep pace with the torrid investment levels in 2000, CLECs still managed an additional \$12.3 billion in capital expenditures in 2001.”⁵⁶³

Indeed, far from creating impairment as some commenters claim, the tightening of the financial markets provides additional reason – if any were necessary – for the Commission to take a balanced approach to unbundling. As explained above, the bankruptcies that have come with this tightening have created a ready source of cheap capacity that will put downward pressure on market prices, and devalue the competitive facilities that have already been – and are continuing to be – deployed in the marketplace. Widespread availability of UNEs would only devalue those facilities further. The Commission has previously taken pains to avoid allowing TELRIC discounts to undermine the existence of facilities-based competition where it has

⁵⁶⁰ 2002 *Local Competition Report* at 17.

⁵⁶¹ *Id.*

⁵⁶² *Id.* at 5.

⁵⁶³ *Id.*

emerged.⁵⁶⁴ It should take similar care here, where facilities-based competition has undoubtedly taken hold and will continue to develop, if the Commission will only let it.⁵⁶⁵

Operational Issues. Commenters identify a handful of operational issues that, they claim, render it impractical to rely on alternative sources of transport. The difficulties created by these alleged issues are vastly overstated, and in all events should be handled directly rather than bootstrapped into the Commission’s impairment analysis.

Commenters first recycle their claims that the purported difficulties and delays associated with collocation arrangements render them impaired without access to ILEC transport.⁵⁶⁶ We discuss above the infirmities of this claim in connection with switching.⁵⁶⁷ In brief, the enormous number of completed collocation arrangements makes it implausible to think that ILEC collocation processes are standing in the way of CLEC reliance on alternative facilities. Indeed, the mere fact that competitive carriers have deployed hundreds of thousands of transport miles makes clear that collocation processes are not preventing them from doing so. And, to the extent CLECs raise concerns regarding the time necessary to complete *new* collocation arrangements, they can rely on ILEC services – or even sub-let space from other CLECs – in the interim. Finally, as we explain above, as a legal matter, if CLECs claims regarding collocation are valid – and SBC continues to believe they are not – they should be resolved directly.⁵⁶⁸

⁵⁶⁴ See *Supplemental Order Clarification*, 15 FCC Rcd at 9597, ¶ 18 (“An immediate transtion to unbundled network element-based special access could undercut the market position of many facilities-based competitive access providers,” thus jeopardizing “a mature source of competition in telecommunications markets.”).

⁵⁶⁵ AT&T asserts that some customers exhibit a preference for AT&T or ILEC facilities, and that this somehow causes impairment. AT&T Comments at 142. But, even taking AT&T’s bare-bones assertion at face value, customer preference can hardly be said to constitute impairment, and provides no justification for requiring an ILEC to unbundle where alternatives are available or the ILEC’s facilities are readily duplicable.

⁵⁶⁶ Norlight Comments at 7; OpenBand Comments at 11-12.

⁵⁶⁷ See *supra* p. 142.

⁵⁶⁸ See *supra* pp. 134-40.

Commenters' claims regarding rights-of-way are likewise best resolved directly, rather than ladled into the impairment analysis.⁵⁶⁹ Indeed, that is precisely what the Commission is doing. It has various proceedings under way to address the different possibilities for making right-of-way access more efficient for all companies.⁵⁷⁰ In this regard, it is important to note that, to the extent rights-of-way and building access present problems, they also impact ILECs, which, like CLECs, generally have to negotiate new rights-of-way for the roll-out of new facilities. It also is important to note that ILECs are obligated to share their rights-of-way with competitors, which mitigates the theoretical advantage ILECs are claimed to have in this regard. The bottom line is that CLECs are not uniquely burdened by rights-of-way issues. Rights-of-way are an industry-wide issue; they cannot be pigeonholed as a CLEC-specific problem, and then used artificially to create impairment where none otherwise exists.

In any event, the problems associated with rights-of-way are obviously not insurmountable in most cases. If rights-of-way were the deal-breaker that AT&T and others claim, it is hard to see how CLECs would have been able to *equal* ILECs in the deployment of fiber.⁵⁷¹ Certainly, AT&T itself has been able to overcome these issues for the **[proprietary begin] XX percent [proprietary end]** of customers that it serves with competitive DS-3 tails.⁵⁷² The Commission cannot ignore concrete evidence of deployment simply because "in theory" CLECs deployment could be made even easier. Reality must trump hypotheticals, and the reality of the dedicated transport market shows that CLECs are more than able to provide service without access to the ILEC network.

⁵⁶⁹ E.g., AT&T Comments at 142-44; Covad Comments at 86.

⁵⁷⁰ See *Third Advanced Services Report*, 17 FCC Rcd at 2906-07, ¶ 166 & n.375 (citing various proceedings addressing rights-of-way management issues).

⁵⁷¹ See *supra* p. 59-60.

⁵⁷² See *supra* p. 19; AT&T Confidential Comments at 150 nn.109-10.

Competitive Triggers. For all of these reasons, as well as those stated in our opening comments, the Commission should remove high-capacity transport from the UNE list entirely. If, however, the Commission is not prepared to remove transport everywhere, it should, at a minimum, take the more granular approach proposed by SBC in its comments. That means declining to order unbundling for DS-3 and above interoffice transmission, and dark fiber. And it means carving out from a DS-1 unbundling obligation wire centers: (1) with two or more fiber-based collocators, (2) with at least 15,000 business lines, or (3) that generate \$150,000 or more in monthly special access revenues. As explained in our opening comments, competitive carriers themselves have demonstrated the availability of alternative facilities in wire centers meeting any of these thresholds.⁵⁷³

B. Loops.

A persistent rhetorical theme running through the CLEC comments is the ILECs' purported "stranglehold" or "bottleneck" in the local exchange. Incumbent LECs, they claim, retain a monopoly grip on the entire local exchange that can only be broken with a promiscuous unbundling regime that permits CLECs access to all network elements in all markets to serve all customers.

The truth, of course, is far more nuanced. No one disputes that, in some markets, for some types of customers purchasing some types of services, ILECs retain high market shares. Nor does any one dispute that, to the extent those customers are served by ILEC facilities that are not "sensibly duplicable," those facilities should be unbundled. But in other markets, for other types of customers purchasing other types of services, CLECs have made tremendous inroads. In particular, as SBC's opening comments explained, CLECs have won between 22.3 and 28.7

⁵⁷³ SBC Comments at 89-93.

percent of the business lines in SBC's region, and their successes in other Bell company regions are comparable.⁵⁷⁴ No amount of name-calling or obfuscation can hide that fact.⁵⁷⁵

Critically – indeed, dispositively, for purposes of this discussion – *CLECs are serving these customers over their own last-mile facilities*. As SBC has explained,⁵⁷⁶ CLECs nationwide serve between 13 and 20 million business lines off their own switches. Yet they have obtained only about 1.5 million unbundled loops to serve business customers. That means that CLECs are using alternative facilities to serve the remaining 85 and 95 percent of those 13-20 million self-switched business lines.⁵⁷⁷

And they are doing so with high-capacity loops. As noted above, ALTS reports that CLECs have now deployed upwards of 350,000 miles of fiber. As SBC previously reported, the majority of CLEC fiber is local.⁵⁷⁸ Indeed, CLECs have deployed approximately 1,800 fiber networks in the 150 largest MSAs.⁵⁷⁹ CLECs use these local fiber networks to provide direct fiber connections between customers' premises (typically office buildings or other MTEs) and CLEC networks, interexchange POPs, or any other location served by the competitive fiber network. In short, they use these high-capacity loops instead of ILEC last-mile facilities.

⁵⁷⁴ See SBC Comments Attach. B at 1-2; *Fact Report* at I-6 (CLEC share of business lines in Bell company regions is between 26 and 33 percent). See also *Morgan Stanley Survey Report* at 3 ("CLECs have gained market share. 42% of businesses use carriers other than an ILEC, which is a significant increase over last year's 29% . . .").

⁵⁷⁵ A recent *ex parte* confirms that the lower bound of this range – based as it is on CLEC listings in the E911 database – is a conservative estimate of CLEC access lines. See Letter from Martha Jenkins, Senior Director, Intrado Inc., to William F. Caton, Acting Secretary, FCC, CC Docket No. 01-378 (FCC filed Apr. 19, 2002). That letter recognizes that, for residential customers, there is basically a one-to-one correlation between E911 listings and lines. It also recognizes that, for business customers, the E911 database understates lines in a key respect because in many cases there are multiple lines for a single listing.

⁵⁷⁶ SBC Comments at 99 (citing *Fact Report* at IV-1 & Table IV-1).

⁵⁷⁷ In SBC's region, the numbers are similar: CLECs are serving between 82 and 91 percent of their self-switched business lines using alternative last-mile facilities. See *id.*

⁵⁷⁸ See *Fact Report* at III-6.

⁵⁷⁹ *Id.* at III-7.

The CLEC commenters in this proceeding never take on these critical facts. They claim that they are impaired without access to ILEC high-capacity loops, but they never explain how, if that is so, they are able to use competitive alternatives to serve close to one in five business customers nationwide. Nor do they explain why, if access to high-capacity loops is so essential, they have largely eschewed reliance on them since the *UNE Remand Order*. Indeed, to assist them in serving their 13-20 *million* business lines, CLECs have purchased a grand total of 72,000 high-capacity loop UNEs – all but 140 of which are DS-1s.⁵⁸⁰

AT&T dismisses the bulk of this evidence outright, reasoning that “[t]here is no generic set of conditions in which” the Commission can conclude that CLECs “can economically provide service to the customers who require [high-capacity] loops.”⁵⁸¹ The theory is apparently that each and every customer that makes up the CLECs’ 13-20 million business lines is a world unto itself, and a CLECs’ ability to serve that customer using its own facilities says nothing at all about its ability to do the same with the customer next door. This position is obviously ridiculous. The Commission’s role here is to make judgments – to extrapolate from those circumstances in which CLECs have proven their ability to compete over their own facilities to the circumstances where they reasonably can be expected to do so. AT&T’s approach, by contrast, would remove the Commission from the equation, and leave it to the CLEC to choose for itself whether to deploy its own facilities or lease UNEs. That position is not only unwise, it is also unlawful. The Supreme Court has held unequivocally that the Commission may not “allow[] entrants, rather than the Commission, to determine whether . . . the failure to obtain access to nonproprietary elements would impair the ability to provide services.”⁵⁸²

⁵⁸⁰ *Id.* at IV-6 & Table IV-2; SBC Comments at 100.

⁵⁸¹ AT&T Comments at 23.

⁵⁸² *Iowa Utils. Bd.*, 525 U.S. at 389.

CLECs – the same CLECs that are successfully serving business customers using their alternative high-capacity loops – also claim that reliance on those alternative facilities raises a set of “impediments” that are not present when carriers rely on UNEs.⁵⁸³ These so-called “impediments,” however, are the same issues that CLECs raise in relation to high-capacity transport: the need to establish collocation, raise capital, and obtain access to rights-of-way.⁵⁸⁴ And they fail here for the same reasons they fail in connection with high-capacity transport.⁵⁸⁵ Most fundamentally, those claims are contrary to fact. The abundance of competitive high-capacity loops – and CLECs’ use of those loops instead of UNEs – fatally undermines the argument that any of these so-called “impediments” rises to the level of impairment.

Moreover, as discussed above, if there truly were problems with obtaining rights-of-way or collocation arrangements – and the marketplace facts make clear that there are not – the solution would be to address those problems directly. And, as noted, the Commission has just such a proceeding to address the possibilities for making right-of-way access more efficient. As for collocation, state and federal provisioning intervals already address the CLECs’ claimed concerns with timing.

Finally, although it is obvious from the record that CLECs are not impaired *anywhere* without unbundled access to DS-3 and above loops and dark fiber, SBC recognizes that the Commission may conclude differently with respect to DS-1s. In that case, SBC reiterates that its proposed carve-out, which matches the carve-out proposed for transport, ensures that unbundling

⁵⁸³ *E.g.*, AT&T Comments at 140-41; Sprint Comments at 22.

⁵⁸⁴ *E.g.*, AT&T Comments at 141-45. AT&T adds here the claim that CLECs are impaired in their ability to collocate at remote terminals – and thereby access subloops – due to a lack of power and space for HVAC systems and other systems. *Id.* As noted above, however, AT&T’s comments cannot reflect actual experience, as its efforts to collocate at remote terminals (like those of other CLECs) have been virtually nonexistent. In any case, CLECs can deploy their own facilities using ILEC rights-of-way and conduits, and can serve their customers using resold or other ILEC services while they negotiate any additional rights-of-way they need, or while they deploy facilities.

⁵⁸⁵ *See supra* pp. 20-21.

does not infect those markets that – according to the CLECs’ own actions – can plainly support alternative high-capacity loops.⁵⁸⁶

C. Enhanced Extended Loops (“EELs”).

As SBC described in its initial comments and in comments filed last year, the abundance of alternatives for both high-capacity loops and dedicated transport means that carriers are not impaired without the ability to purchase those elements in combination – *i.e.*, as high-capacity loops and/or loop-transport combinations that would substitute for special access services.⁵⁸⁷ In addition, the Commission must conclude that CLECs that are using special access services today are, by definition, not impaired without unbundled access to the facilities that provide that service. As one CLEC explains, CLECs have “been able to successfully utilize special access circuits” to connect their own networks “with end user customers.”⁵⁸⁸ In light of that reality, it is impossible to say that such CLECs are impaired without access to UNEs.

Even if the Commission leaves in place some unbundling obligations for high-capacity loops and transport, it must, at a bare minimum, preserve the requirement that such elements be unbundled only where the CLEC uses the facility in question to provide a significant amount of local service to the end-user. Commenters’ challenges to that requirement misunderstand the theory behind it, and misstate its practical effect.

As an initial matter, a number of commenters claim that the sole rationale behind the local use requirement is the concern that competitive carriers would use UNEs to bypass special

⁵⁸⁶ See SBC Comments at 101.

⁵⁸⁷ See Comments of SBC and Verizon, CC Docket No. 96-98 (FCC filed Apr. 5, 2001); Reply Comments of SBC and Verizon, CC Docket No. 96-98 (FCC filed Apr. 30, 2001).

⁵⁸⁸ Norlight Comments at 5. WorldCom likewise appears to endorse the viability of using special access services to serve customers. It states that it “relies on ILEC last-mile DS-3s to reach thousands of buildings.” WorldCom Comments at 75-76. Because the Bell companies nationwide have provisioned less than 150 DS-3 UNEs, *see Fact Report* at IV-6 & Table 2, the vast majority of the circuits to which it refers are very likely special access circuits.

access, and thereby undermine universal service.⁵⁸⁹ Although that rationale was – and remains⁵⁹⁰ – a legitimate basis for the Commission’s rulings, it does not stand alone. Rather, the Commission’s conclusions in this regard were also grounded on its determinations that allowing the substitution of UNEs for special access would undermine facilities-based competition, and that CLECs were not impaired without unbundled access to loop-transport combinations.⁵⁹¹

Both rationales remain in full force today. SBC’s opening comments noted the plethora of competitive access providers that are providing service over their own facilities today. As the FCC has found, those facilities would be seriously devalued – and the business plans of those facilities-based providers fatally undermined – if competitors were able to obtain special access circuits at UNE rates: “An immediate transtion to unbundled network element-based special access could undercut the market position of many facilities-based competitive access providers,” thus jeopardizing “a mature source of competition in telecommunications markets.”⁵⁹² Moreover, as SBC demonstrated in its opening comments, the special access market is even more competitive today than it was when the Commission put in place rules preventing CLECs from substituting UNEs for special access circuits. The justification for those rules is therefore even stronger today than it was when they were first promulgated.

Recognizing that its claimed entitlement to substitute UNEs for special access is fatally undermined by the existence of competition in that market, AT&T attempts to downplay that competition. It claims that competitive carriers have actually captured only 12 percent of special

⁵⁸⁹ *E.g.*, ALTS Comments at 100-03; NuVox, *et al.* Comments at 49-50.

⁵⁹⁰ Contrary to the claims of a few commenters, *see* ALTS Comments at 105; Business Telecom Comments at 14, access charges remain a significant source of universal service funding, notwithstanding the partial settlement of universal service and access charge issues reflected in the *CALLS Order*.

⁵⁹¹ *See Supplemental Order Clarification*, 15 FCC Rcd at 9596, ¶ 16, 9597, ¶ 18.

⁵⁹² *Id.* at 9597, ¶ 18.

access services.⁵⁹³ But Appendix L of the *Fact Report* shows the fallacy of that position.⁵⁹⁴

AT&T relies on the FCC's *revenue* data to estimate CLEC special access revenues. The flaw with that approach is that several CLECs – including WorldCom and AT&T itself – report some of their special access revenues as toll carriers, not as CLECs.⁵⁹⁵ Indeed, AT&T acknowledges that “MCI/WorldCom and AT&T fall within the category of ‘Toll Carrier’ and, as a result, *any self-supplied special access may not be included in the CLEC figure.*”⁵⁹⁶ Because IXC's are by far the largest purchasers of special access services and because they are also major self-suppliers of access services,⁵⁹⁷ an enormous portion of revenue is omitted from the Commission's CLEC data.

A more reliable source for competitive special access revenue comes from New Paradigm Resource Group's *CLEC Report 2002*, and those data yield a CLEC market share of 39 percent.⁵⁹⁸ But, even taking the most conservative approach – using the FCC's data plus AT&T and WorldCom's reported special access revenues – CLECs have a market share of 28 percent.⁵⁹⁹ With anywhere from 28 to 39 percent of the special access market, it can hardly be

⁵⁹³ AT&T Comments at 125.

⁵⁹⁴ BellSouth, SBC, and Verizon have also refuted this claim, as well as AT&T's additional criticisms of the data the companies submitted in April 2001, in a Rebuttal Report Regarding Competition for Special Access Service, High-Capacity Loops, and Interoffice Transport, CC Docket No. 96-98 (FCC filed June 25, 2001) (“Rebuttal Report”). For example, AT&T claims again in this proceeding that the ILECs have overestimated the number of buildings served by competitive fiber. AT&T Comments at 153. As the Rebuttal Report explains, AT&T is part of a coalition that itself reported that buildings accounting for “‘roughly one third of the 60 million or so business lines in the country’” are directly connected to CLEC fiber. Rebuttal Report at 11 (quoting Smart Buildings Policy Project, *Meet the Coalition*, at <http://www.buildingconnections.org/pages/coalition.html>) (emphasis omitted); see also *id.* at 16-20.

⁵⁹⁵ *Fact Report* App. L.

⁵⁹⁶ Declaration of C. Michael Pfau on Behalf of AT&T Corp. ¶ 16 (Exh. B to Reply Comments of AT&T Corp., CC Docket No. 96-98 (FCC filed Apr. 30, 2001)) (emphasis added).

⁵⁹⁷ See *Fact Report* at V-19 & n.70.

⁵⁹⁸ *Id.* App. L.

⁵⁹⁹ As the *Fact Report* explains, this figure is undoubtedly too low, because it fails to account for the self-supply by IXC's other than AT&T and WorldCom, ignores revenue earned from the resale of ILEC and CLEC services, and does not account for the fact that special access revenues were likely higher in 2001 than in 2000. *Id.*

said that CLECs are impaired without the ability to purchase UNEs in place of special access circuits.

Unable to challenge the underpinnings of the Commission's decision to preclude the substitution of UNEs for special access, commenters instead take aim at the methods the Commission put in place to achieve that goal – *i.e.*, the local use requirement, and the commingling restrictions.⁶⁰⁰ They claim, for example, that ILECs have misapplied those restrictions, rendering it “effectively impossible for CLECs to gain access to loop-transport UNEs, even when they are seeking to use those UNEs to provide substantial amounts of local services to customers.”⁶⁰¹ But the absence of support for this contention is telling. The truth is that ILECs have adhered to the Commission's requirements for converting special access circuits. Indeed, SBC has methods and procedures in place throughout its 13-state region to permit CLECs to convert special access circuits to EELs – provided, of course, that the CLEC satisfies the Commission's requirements. Moreover, the Commission itself recently explained that commenters are “quite wrong in contending that the FCC's safe harbors are effectively unusable.”⁶⁰² These commenters, according to the Commission, “engage in pure hyperbole in claiming that the challenged safe harbor provisions make the conversion of special access circuits to UNE combinations effectively impossible.”⁶⁰³ “Requesting carriers have made use of the safe harbors set out in the *Order* and, presumably, are continuing to do so.”⁶⁰⁴

⁶⁰⁰ CompTel cuts and pastes a section from its brief in the appeal of the *Supplemental Order Clarification* to contend that the FCC's rules in this regard are impermissible “use restrictions.” See CompTel Comments at 90-95. For the reasons explained in the FCC's brief in that same case, those arguments fail.

⁶⁰¹ AT&T Comments at 104; see ALTS Comments at 101-02; CompTel Comments at 95-96 & n.200.

⁶⁰² FCC Special Access Br. at 20.

⁶⁰³ *Id.* at 36.

⁶⁰⁴ *Id.* at 36-37; see also Memorandum Opinion and Order, *Net2000 Communications, Inc. v. Verizon*, 17 FCC Rcd 1150, 1155, ¶ 16 n.42 (2002). Moreover, as the Commission has noted, CLECs as well as ILECs supported these safe harbors. FCC Special Access Br. at 37-38.

CompTel nevertheless contends that the Commission should eliminate the collocation requirement in two of the three available methods for satisfying the Commission's local use requirement, on the theory that it is "superseded" by the local use requirement itself.⁶⁰⁵ But the specific safe harbors set out in the *Supplemental Order Clarification* – which, it is worth noting, were jointly proposed by facilities-based CLECs and ILECs – are not intended to be substitutes for the local use requirement. Rather, they are *methods* by which a competitive carrier can satisfy that requirement. Absent an alternative to ensure that carriers use the EEL to compete in the local market (rather than improperly to avoid access charges) – and no commenter provides one – the collocation requirements must remain in place.

Commenters also contend that the Commission should eliminate the commingling restrictions. They allege that these restrictions make it uneconomic to convert any circuits to UNEs by requiring CLECs "to build and operate two distinct overlapping networks."⁶⁰⁶ CLECs thus contend that they not only should be permitted to combine a UNE with an access service (which they already may do through any of the thousands of collocation arrangements already in place), but also that they should be permitted to combine UNE and access traffic on the same facility.⁶⁰⁷ As the Commission found in the *Supplemental Order Clarification*, however, commingling inevitably would "lead to the use of unbundled network elements by IXC's solely or primarily to bypass special access services,"⁶⁰⁸ and thus undermine a "mature source of competition in telecommunications markets."⁶⁰⁹

⁶⁰⁵ CompTel Comments at 98.

⁶⁰⁶ ALTS Comments at 106; CompTel Comments at 97; AT&T Comments at 107-08; Sprint Comments at 55-56.

⁶⁰⁷ AT&T Comments at 106-08.

⁶⁰⁸ *Supplemental Order Clarification*, 15 FCC Rcd at 9602, ¶ 28.

⁶⁰⁹ *Id.* at 9597, ¶ 18.

Indeed, permitting CLECs to commingle UNE and access traffic on the same facility not only would require the Commission to create a new UNE (individual channels on a DS-1 or DS-3 facility), it also would eliminate the distinction between UNEs and services. Unbundled access to network elements involves surrendering a *facility* to a CLECs network, and thus traffic transported over a UNE is (at least in theory) considered part of the CLEC's network. In contrast, special access traffic is transported over the *ILEC's* network. It is incoherent to claim that a requesting carrier can demand exclusive access to a particular circuit at the same time the ILEC is required to provide services over that same circuit.

Moreover, the Commission previously has concluded that UNEs are distinguishable from services because they “present different opportunities, risks and costs.”⁶¹⁰ But the individual-channels-on-a-DS-3 “UNE” that AT&T and others propose would not enable a requesting carrier to “distinguish” its services from the ILEC's or “package and market services in ways that differ from the incumbent's existing service offerings.”⁶¹¹ The individual-channels-on-a-DS-3 “UNE” thus would not present different opportunities or risks from the ILEC's service. Rather, it simply would force ILECs to re-price their tariffed special access services, contrary to the *Pricing Flexibility Order* and flatly inconsistent with the very concept of a UNE.

Permitting commingling also would raise significant implementation issues. For example, a requesting carrier that purchases UNEs has testing and other “virtual network” responsibilities, while an ILEC has such responsibilities for special access services. Any service issues on a commingled circuit would raise issues relating to whether the ILEC or CLEC would have such responsibilities. And, even if it were the ILEC, service on a commingled circuit would require coordination between separate ILEC service organizations because ILECs, like

⁶¹⁰ *Local Competition Order*, 11 FCC Rcd at 15667, ¶ 331.

⁶¹¹ *Id.* at 15667-69, ¶¶ 332-334.

SBC, maintain separate service organizations for UNEs and special access services. The Commission therefore should retain the commingling restrictions.

Finally, one commenter (ALTS) requests that the Commission give CLECs a license to abrogate their special-access contracts with impunity, and convert special-access circuits to UNEs without paying any termination fees that may be applicable.⁶¹² But, even assuming such conversion should be permitted in the first place – and, as we have explained, it should not – there is no basis for excusing CLECs from the terms of contracts they knowingly and expressly agreed to. Indeed, the only basis for this rather odd request is ILECs’ purported “intransigence” in offering EELs.⁶¹³ Yet, as noted above, ALTS provides no support for this characterization, and SBC is aware of none. The fact of the matter is that CLECs could have purchased circuits without any termination liabilities, but chose not to. Those are business decisions they made, with full awareness of the benefits and consequences. The Commission has no business permitting CLECs to retain the *quid* – i.e., low special access rates predicated on a specific term⁶¹⁴ – while excusing them from the *quo*.

IV. OTHER UNEs

A. Signaling and Call-Related Databases.

The Commission’s decision to require unbundled signaling and call-related databases in the *UNE Remand Order* rested on the Commission’s view that third-party providers of signaling and call-related databases could not match the ubiquity of the ILEC’s network.⁶¹⁵ The

⁶¹² ALTS Comments at 103, 128-29.

⁶¹³ *Id.*

⁶¹⁴ *See* ALTS Comments at 128.

⁶¹⁵ *UNE Remand Order*, 15 FCC Rcd at 3869, ¶ 388, 3871, ¶ 394, 3878, ¶ 410.

commenters seeking access to unbundled signaling and call-related databases simply repeat these “ubiquity” claims in their effort to retain these elements as UNEs.⁶¹⁶

In fact, however, there are ample alternatives to the ILECs’ signaling and call-related databases and CLECs are successfully using them to compete.

Signaling. CLECs can obtain Alternative Signaling System 7 (“SS7”) services from multiple sources. ICG, Illuminet, and TSI, for example, all provide wholesale signaling.⁶¹⁷ All of these carriers boast ubiquitous service. ICG advertises that its SS7 network “offers . . . the ability to enjoy nationwide SS7 connectivity without having to connect links from network nodes to each IXC, LATA, and/or LEC.”⁶¹⁸ Illuminet offers “direct access to all the [LATAs] of the [RBOCs] and major [independent LECs].”⁶¹⁹ TSI provides “access to and from nearly all LATAs to numerous STPs nationwide without many of the costs associated with establishing multiple links.”⁶²⁰ In addition, there are a multitude of regional SS7 providers, as the Commission found in the *UNE Remand Order*.⁶²¹ And CLECs can also deploy their own signaling networks. Indeed, the Commission found in the *UNE Remand Order* that, in GTE’s service area alone, there were 12 CLECs that constructed their own signaling networks.⁶²²

⁶¹⁶ See, e.g., ALTS Comments at 89 (“Given the inability of alternative SS7 providers to match the ubiquity of the ILEC network the alternative providers do not provide a functional substitute to CLECs”); Illuminet Comments at 8 (“The construction and operation of a stand-alone SS7 signaling system and the data bases necessary for provision of many services is a complex and very capital intensive undertaking which may serve as a barrier to entry for smaller firms.”); NuVox, *et al.* Comments at 106 (“Alternative providers continue to be unable to match the service reliability and ubiquity of the signaling UNE.”); *id.* at 109 (“[T]here continue to be no alternatives of comparable quality and ubiquity available to requesting carriers, as a practical, economic, and operational matter, for the incumbent LECs’ call-related databases.”).

⁶¹⁷ Verizon Comments at 130-32.

⁶¹⁸ ICG Communications, *Signaling System 7 (SS7)*, at <http://www.icgcom.com/products/carrier/ss7.asp>.

⁶¹⁹ See Illuminet, *SS7 Network Connectivity*, at <http://www.illuminet.com/products/lec/network.shtml>.

⁶²⁰ TSI Telecommunications Services, Inc., *SS& Intelligent Network Services*, at http://www.tsiconnections.com/print_email/print/display.cfm?ID=25&MarketID=2.

⁶²¹ *UNE Remand Order*, 15 FCC Rcd at 3869-70, ¶ 389.

⁶²² *Id.*

The Commission previously recognized in the *UNE Remand Order* that “cost-effective SS7 signaling networks are generally available on a national basis.”⁶²³ Using these third-party facilities, the Commission found, “would not involve substantial and material costs or delay competition.”⁶²⁴ The Commission resisted removing signaling from the list of UNEs simply because it was concerned that these alternative providers could not match the ILECs’ ubiquitous network. As SBC discussed in its initial comments, the Commission’s reliance on “ubiquity” in the impair inquiry was misplaced.⁶²⁵ In any event, however, it is now clear that signaling is widely available in all markets. Verizon points out that it cannot identify a single carrier that obtains SS7 as a UNE.⁶²⁶

Call-Related Databases. Many of the same vendors that provide signaling also provide access to call-related databases. Illuminet, for instance, offers “high-speed access to all LIDBs in the country”⁶²⁷ and “operates its own database containing over 32 million line information records.”⁶²⁸ Illuminet also offers calling name database access on a query basis.⁶²⁹ TSI offers LIDB access,⁶³⁰ toll-free database access,⁶³¹ and calling name service.⁶³² Additional vendors also provide access to these databases.⁶³³ And, too, CLECs can easily deploy their own database

⁶²³ *Id.* at 3870-71, ¶ 392.

⁶²⁴ *Id.* at 3870, ¶ 391.

⁶²⁵ SBC Comments at 37-39. *See also* BellSouth Comments at 105-06.

⁶²⁶ Verizon Comments at 130.

⁶²⁷ Illuminet, *Local Exchange Carriers*, at <http://www.illuminet.com/products/lec/>.

⁶²⁸ Illuminet Comments at 6.

⁶²⁹ *Id.* at 7.

⁶³⁰ TSI Telecommunications Services, Inc., *SS7 Intelligent Network Services*, at http://www.tsiconnections.com/print_email/print/display.cfm?ID=29&MarketID=2.

⁶³¹ TSI Telecommunications Services, Inc., *SS7 Intelligent Network Services*, at http://www.tsiconnections.com/print_email/print/display.cfm?ID=48&MarketID=2.

⁶³² TSI Telecommunications Services, Inc., *SS7 Intelligent Network Services*, at http://www.tsiconnections.com/print_email/print/display.cfm?ID=6&MarketID=2.

⁶³³ *See* Verizon Comments at 133-34.

capabilities.⁶³⁴ The widespread use of these alternatives belies any claim that these sources are insufficient alternatives to the ILEC network. The Commission cannot permit theoretical concerns with ubiquity to override what is actually occurring in the marketplace. And CLECs are successfully competing with these alternative facilities.

Despite the available options for call related databases, WorldCom requests that the Commission require ILECs “to provide access to call related databases, such as CNAM, via batch downloads, so that switch-based CLECs can maintain their own CNAM databases.”⁶³⁵ The Commission should flatly reject this proposal. CLECs are not impaired without a download of the complete databases possessed by ILECs – far from it. The thriving alternatives discussed above, coupled with existing methods of access, are amply sufficient. The LIDB and CNAM databases function the same for all carriers, including ILECs, CLECs, IXC and CMRS providers. Under the current process, CLECs receive nondiscriminatory access to the ILEC’s call-related databases (*all* carriers access the databases via queries to the regional signaling transfer point, STP). This method of access is used whether a CLEC accesses an ILEC-owned database or a database owned by a competitive database provider, like Illuminet. The queries follow nationally developed routing instructions that ensure non-discriminatory processing. In the *Local Competition Order*, the Commission found this method of access sufficient for the unbundling of the ILEC owned call-related databases,⁶³⁶ and nothing has happened since then to undermine this method of access. Because the CLECs’ method of access is the same as the ILECs’ method of access, CLECs cannot be impaired.

⁶³⁴ *See id.*

⁶³⁵ WorldCom Comments at 124.

⁶³⁶ *See Local Competition Order*, 11 FCC Rcd at 15742, ¶ 485 (“We, therefore, emphasize that access to call-related databases must be provided through interconnection at the STP and that we do not require direct access to the call-related databases.”).

WorldCom states that it wishes to become a competitive database provider and suggests that a bulk download of the ILEC-owned call-related databases on an unbundled basis is a cost-effective solution to launch this line of business.⁶³⁷ Aside from the myriad of privacy and confidentiality issues associated with implementing a bulk download of the databases,⁶³⁸ WorldCom's request goes well beyond the Act's unbundling mandate. ILECs are only obligated to provide access to UNEs for the provision of telecommunications services. Stated another way, the ILEC's duty ends when the CLECs have access to the necessary elements to provision competitive telecommunications services. The existing method of access, via queries to the STP, satisfies the ILEC's statutory obligation. The creation of call-related databases is not a telecommunications service. Therefore, the ILECs cannot be required to provide a download of the database on an unbundled basis.

As illustrated above, there are very successful competitive database providers that have developed successful businesses without a bulk download from the ILECs. If WorldCom wishes to enter this business, it should follow the examples of Illuminet, TSI and their peers.

B. OSS

The Commission has found that "lack of access to the incumbent LEC's OSS impairs the ability of requesting carriers to provide the services they seek to offer,"⁶³⁹ and SBC does not quarrel with that conclusion here. As the Commission has also found, however, unbundled OSS need not and should not include direct access to back-office systems.⁶⁴⁰ Rather, ILECs satisfy

⁶³⁷ See WorldCom Comments at 125-26.

⁶³⁸ The call-related databases contain confidential customer information like non-published telephone numbers and addresses, calling card numbers, credit card numbers, as well as proprietary information that the local service providers use to bill and/or provision customer services (*e.g.*, customer's call blocking & toll restrictions). If ILECs are required to provide a complete download of the call-related databases, consumer privacy rights may be violated.

⁶³⁹ *UNE Remand Order*, 15 FCC Rcd at 3887, ¶ 433.

⁶⁴⁰ Cf. Covad Comments at 76 (arguing that CLECs should have access to "all information that the ILEC possesses anywhere in its network and that such information must be provided on an electronic basis to the extent

the Act's requirements by "provid[ing] carriers with the same underlying information that it has in any of its own databases or internal records" without offering direct access to those records.⁶⁴¹

"[T]o the extent such information is not normally provided to the incumbent's retail personnel, but can be obtained by contacting back office personnel," the Act requires only that the information itself "be provided to requesting carriers within the same time frame that any incumbent personnel are able to obtain such information."⁶⁴²

Back office systems contain confidential and proprietary information about the ILEC's business, its customers, and other CLECs. For example, SBC's back office systems include inventories of services for all retail and wholesale customers, a listing of in-service network elements and their specific usage, and confidential information regarding the internal management of SBC's personnel and resources. SWBT's TIRKS system contains an inventory of all CLEC tie cables in SWBT's central offices; allowing access to this system would thus allow one CLEC to analyze another CLEC's business and market penetration. SWBT's TIRKS/Generic Order Control module contains data on all pending access and special service orders within a SWBT geographical area. SBC's back office systems also contain highly sensitive information such as fiber and cable deployment routes to airlines, airports, police stations, fire stations, hospitals, and government agencies; unlisted telephone numbers; and security alarm information.

This proprietary information is hardly "necessary" for CLECs to compete. CLECs already have all the information they need, including loop qualification information, without

technically feasible"); *id.* at 77 ("The Commission also should direct ILECs to provide interfaces to their OSS information about all loop information, including fiber-fed DSL-capable loops."); *Supra* Comments at 19 (requesting "the implementation of one uniform OSS for the entire telecommunications industry"). *See also Illinois HFPL Order* at 60 (ordering Ameritech-IL to provide CLECs with both direct and gateway access to loop provisioning information).

⁶⁴¹ *Kansas/Oklahoma 271 Order*, 16 FCC Rcd at 6293, ¶ 121.

⁶⁴² *UNE Remand Order*, 15 FCC Rcd at 3885-87, ¶¶ 427-431.

access to back office systems. Indeed, CLECs receive the same information that the ILECs' own retail subsidiaries use. Accordingly, the Commission should clarify in this proceeding that unbundled access to back office systems fails the "necessary" test of section 251(d)(2) and cannot be required, either in this proceeding or in state proceedings.

C. Operator Services ("OS") and Directory Assistance ("DA").

In light of the abundance of competitive alternatives available to CLECs, the D.C. Circuit's decision mandates that the Commission reject requests to require unbundling of Operator Services, Directory Assistance, and the Directory Assistance Listings Databases. While all LECs are required to provide nondiscriminatory access to their OS and DA services and DA listings to requesting carriers under section 251(b)(3), incumbent LECs should not be required to provide them as UNEs. In the *UNE Remand Order*, the Commission observed that "[t]he record provides significant evidence of a wholesale market in the provision of OS/DA services and opportunities for self-provisioning OS/DA services."⁶⁴³ The record is even stronger today. There are at least two dozen "major players" in directory assistance.⁶⁴⁴ Many of these providers compete in every state, and analysts agree this market is "extremely competitive."⁶⁴⁵ "An analysis of DA calling volumes [] reveals declining retail and wholesale DA for major ILECs at the same time competitors' DA volumes have increased."⁶⁴⁶ Internet providers of directory assistance are also providing competition to local and national directory assistance.⁶⁴⁷ CLECs have thus conclusively demonstrated that they do not need unbundled OS/DA to compete; the irrefutable proof is that they are thriving without it.

⁶⁴³ *Id.* at 3891, ¶ 441.

⁶⁴⁴ Akweli Parker, *Here's the 911 on Your 411 Problems*, Knight Ridder/Trib. News Serv., Feb. 22, 2002.

⁶⁴⁵ William E. Taylor & Harold Ware, NERA, *Competition and Regulation for Directory Assistance Services* at 2, 13 (Apr. 1, 2002) (citing study by First Market Research).

⁶⁴⁶ *Id.* at 13 (citing study by First Market Research); *see also id.* at 28.

⁶⁴⁷ *Id.* at 23 (citing study by First Market Research).

Undaunted by this real-world evidence, some commenters nevertheless ask for OS/DA services and DA Listings as UNEs. They make vague claims – claims that echo throughout their comments, no matter what the element or the market facts – that the ILECs have “economies of scale and scope” and cost advantages in their provision of OS/DA that justify requiring ILECs to provide them as UNEs.⁶⁴⁸ The D.C. Circuit’s opinion has made clear, however, that these hypothetical concerns, unsubstantiated with marketplace evidence and unaccompanied by an affirmative showing of impairment, cannot be the basis for an unbundling requirement. “When a substantial number of CLECs are deploying facilities other than UNEs, and when those facilities serve or potentially serve a large proportion of access lines, then the impairment argument is not merely weakened but unsupportable.”⁶⁴⁹ The Commission must look to what is actually happening, and if CLECs are competing without using the ILEC’s network, unbundling would be not only inappropriate, but also competitively harmful.

⁶⁴⁸ ALTS Comments at 93-94 (stating the arguments of RCN); UNE Platform Coalition Comments at 55-59 (arguing that UNE-P carriers are impaired without access to OS/DA); WorldCom Comments at 127-29 (arguing for unbundled access to DA Listings).

⁶⁴⁹ Shelanski Decl. ¶ 72.

CONCLUSION

The Commission should reject the “more UNEs, the better” argument of the CLECs and revise its unbundling rules to take account of competition where it exists, and to encourage real, not synthetic, competition where it does not.

Respectfully submitted,

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